Supreme Court, U.S.
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92-685

IN THE

Supreme Court of the United States

October Term, 1992

STATE OF OHIO, on relation of Darlene Rogers,
Petitioner,

vs.

ROBERT A. TAFT, Ohio Secretary of State, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Voting Rights Act of 1965 as amended mandates the creation of majority-minority districts as a matter of law.

LIST OF PARTIES

State of Ohio, on Relation
of Darlene Rogers[1]
455 Redondo Road
Youngstown, Ohio 44504

v.

Robert A. Taft
Ohio Secretary of State
30 E. Broad Street
14th Floor
Columbus, Ohio 43215

and

The Mahoning County Board
of Elections
2801 Market Street
Youngstown, Ohio 44507

---

[1] A motion was filed on September 22, 1992, requesting that Mr. Isadore Blakeny, 2715 Mariner Avenue, Youngstown, Ohio 44505, be substituted for Ms. Darlene Rogers as Petitioner in this matter.

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No. _____

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Darlene Rogers, respectfully prays that a Writ of Certiorari issue to review the Judgment on summary disposition entered in this case in the Ohio Supreme Court on June 19, 1992.

OPINION BELOW

The opinion on summary judgment of the Ohio Supreme Court appears at 64 Ohio St. 3d 193, 594 N.E.2d 576 (1992).

JURISDICTION

Review is sought of an opinion of the Ohio Supreme Court announced on June 19, 1992. This Petition for a Writ of Certiorari has been filed within ninety (90) days of the June 19, 1992 opinion. This Court has jurisdiction to grant this Petition under 28 U.S.C. §1257(a).

FEDERAL STATUTORY PROVISION INVOLVED

The federal question in this appeal arises under Section 2 of the Voting Rights Act of 1965, as amended, which provides, in pertinent part:

> **Denial or abridgement of right to vote on account of race or color through voting qualifications; prerequisites; establishment of violation** (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. §1973(f)(2)], as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. Section 42 U.S.C. §1973.

STATEMENT OF THE CASE

This is a federal voting rights action; it is directly related to *George V. Voinovich, Governor of the State of Ohio, et al. v. Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, et al.*, Case No. 91-1618 (A-693) and should, if certiorari is granted, be consolidated with *Voinovich* for oral argument during the Court's October term.

This matter has its origin in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), which determined that *Thornburg v. Gingles*, 478 U.S. 30 (1986) did not establish exclusive *prima facie* criteria for proof of a violation of the Voting Rights Act. Petitioner is a member of Plaintiffs' class in *Armour*. Petitioner appeals here solely in her capacity as a member of the *Armour* class and on behalf of the *Armour* class. The *Armour* class consists of African-American voting-aged residents of the 64th Ohio General Assembly House of Representatives Legislative District. The 64th district is located in Youngstown, Ohio. Prior to the granting of relief in *Armour* and publication of Ohio's 1991 legislative reapportionment plan, the present 64th Ohio House District, in large measure, was divided between two districts established pursuant to Ohio's 1981 legislative reapportionment plan. Plaintiffs in *Armour*, members of both the Republican and Democratic political parties, successfully demonstrated that the 1981 Ohio House of Representative legislative boundaries applicable to their class violated the Voting Rights Act, by the splitting of a large and geographically cohesive minority group between two single member districts.[1] A three-judge district court convened under 28 U.S.C.

[1] Roughly 40,000 African-Americans reside in Youngstown, Ohio. Ninety-eight percent of these citizens are members of the *Armour* class. *See, Thornburg, supra* at n.12.

§2284(a). *See, Armour v. Ohio*, 925 F.2d 987 (6th Cir. 1991), determined that the totality of evidence presented by the *Armour* class established that segregation and racial discrimination have been a way in life in the Youngstown, Ohio area since African-Americans settled there at the turn of the twentieth century.

The *Armour* defendants, the Mahoning County Board of Elections and the State of Ohio, were ordered in *Armour* to rectify, in Ohio's 1991 reapportionment plan, the violation of Plaintiffs' voting rights proved in the *Armour* trial. The Defendant State of Ohio, with the active approval, consent, and participation, of Secretary of State Taft, Defendant in this appeal, went beyond the requirements of the Voting Rights Act or the proof or injunction in *Armour*, when it reapportioned Ohio's African-American population in 1991. Defendants adopted a statewide policy that:

> "Where opportunities exist, the State must maximize minority voting strength. Thus, it may be a violation of Section 2 for a State to fail to create a district in which minorities are the majority if such a district can be created . . . Even if not a 'right' maximization of minority voting strength may clearly be a remedy."

Pretrial Brief of Defendants in *Voinivich v. Quilter*, *supra*, at 28.

Ohio's 1991 Reapportionment Plan is predicated on the notion that the strictures of the Ohio Constitution and Ohio election law may be disregarded with impunity, by reason of an overriding Supremacy Clause obligation to observe a federal Voting Rights Act mandate to maximize minority voting strength wherever possible, on the basis of race alone as a matter of status and law, notwithstanding a need to traverse state law in order to accomplish this end. In light of the repeated articulation

of this federally mandated minority district policy by agents for the State during hearings on the 1991 legislative reapportionment, Petitioners here sought through an original action in mandamus to compel the State's chief elections officer on behalf of the State, to apply this policy equally, to all elections, not just to elections for the Ohio General Assembly.[2]

---

[2] Under Ohio law, the election of members to the Ohio General assembly is governed by Article XI of the Ohio Constitution. The Ohio general assembly is a bicameral body that consists of a thirty-three member Senate and a ninety-nine member House of Representatives. Legislative Districts are established following the decennial census according to state-based criteria that are calculated to minimize partisan gerrymandering. *See*, Article XI, §7, Ohio Constitution.

In Ohio, voters elect judges for courts of general jurisdiction. Under Ohio law general jurisdiction judges are elected on a county-wide or at-large basis. *See*, §2301.05, Ohio Rev. Code Ann. (Baldwin 1991). County commissioners are also elected in a county-wide or at-large basis. *See*, §305.01 Ohio Rev. Code Ann. (Baldwin 1990). County commissioners and common pleas judges are elected to four and six year terms respectively. *See*, § 3501.02 Ohio Rev. Code Ann. (Baldwin 1991).

Petitioners' class here comprises roughly 17% of the total population in Mahoning County, Ohio, the county in which the City of Youngstown is located. There are four general jurisdiction or common pleas judges in Mahoning County. These judges are elected at-large by county. County government in Ohio is managed by three commissioners per county. County commissioners are elected on a county-wide at-large basis. Accordingly, a majority-minority district "could be", under the policy adopted by Defendants, the State of Ohio and Taft, for election of the General Assembly, be formed for the election of a common pleas judge or a county commissioner in Mahoning County, *i.e.*, 250,000 total population divided by four judgeships equals four, 62,500 person districts. One of these judicial districts "could be" majority-minority; or 250,000 total population divided by three commissioners equals three, 83,000 person commissioner districts, one of which "could be" majority-minority.

In other words, Petitioners requested that the Ohio Supreme Court order the State of Ohio and Secretary Taft to apply the State of Ohio policy, adopted in connection with the 1991 Reapportionment Plan that requires maximization of minority voting strength, to all at-large and Mahoning County elections where majority-minority districts "can be" formed. This is particularly appropriate in relation to Mahoning County elections since it has been determined through litigation that segregation and discrimination have had prolific careers and altered the outcome of Mahoning County political contests. *See, Armour, supra.* In an opinion which gave rise to this Petition, the Ohio Supreme Court stated: "[R]elator [has not] *adduced any evidence* that the State has violated ... the Voting Rights Act of 1965 by providing for the election of judges, county commissioners, and others at-large instead of from separate districts." *State ex rel. Rogers v. Taft,* 64 Ohio St. 3d 193, 196, 594 N.E.2d 576 (1992) (emphasis added). The conclusion by the Ohio Supreme Court that "evidence" is necessary to establish an entitlement to a majority-minority district, flies in the face of the blanket policy established by Ohio in state representative elections that mere status as a block of minority voters capable of forming a majority, is sufficient to create a right to a majority-minority district. Accordingly, Petitioners seek review of this conclusion.

This matter should be consolidated with *Voinovich v. Quilter, supra,* for oral argument if review is granted for the reason any ruling by the United States Supreme Court concerning whether §2 creates *per se* obligations, in the absence of proof of the existence of unequal access to the processes leading to nomination and election of representatives of choice, should address the impact of such a *per se* obligation on at-large and county-wide elections at all levels in Ohio, not just state representative contests.

REASONS FOR GRANTING THE WRIT

The question presented for review here strikes at the very heart of whether key Ohio officials such as the Governor, Senate President, and Secretary of State sincerely desire to eradicate lingering vestiges of bondage and involuntary servitude from the lives of Ohio minority citizens or whether a cruel hoax has been perpetrated against minority citizens under the guise of a benevolent application of civil rights legislation of long term and critical importance to this nation, the federal Voting Rights Act.

The federal Voting Rights Act was enacted, among other reasons, to assure that representative government is established throughout this country. The achievement of such government is not possible where disparate weight is accorded arbitrarily to the votes of any group or individual. Under the federal Voting Rights Act, state and local election procedures that operate to debase minority voting strength may be enjoined. Nonetheless, in the absence of proof of a confluence of conditions that produce voting inequality, the Voting Rights Act does not provide a blanket justification for State imposed maximization of minority voting power. This is the case for the reason such *per se* application of the Voting Rights Act would operate to under value the voting strength of non-minority voters, in circumstances where the voting patterns or social behavior of these non-minority voters may not warrant such voting power debasement.

The three-judge district court in *Voinovich v. Quilter, supra,* correctly applied the Voting Rights Act in this manner. In point of fact, the Court determined:

Both *Gingles* and the Senate Report state that violations of the Voting Right Act must be proven, not assumed, as a predicate for remedial action. In this regard, the Court in *Gingles* stated:

> Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multi-member structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multi-member district. By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that §2 plaintiffs prove their claim before they may be awarded relief.

Gingles, 478 U.S. at 48 n.15.

The Senate Report is equally clear, particularly with respect to proof concerning racial bloc voting:

> The result test *makes no assumptions one way or the other* about the role of racial political considerations in a particular community. If plaintiffs assert that they are denied fair access to the political process, in part, because of the racial bloc voting context within which the challenged election system works, they would have to prove it.

S. Rep. No. 417, 97th Cong.2d Sess.34 (1982), *reprinted in* U.S.C.C.A.N. 177, 212.

Defendants, as the majority of the Apportioning Board, have proclaimed their mission to be the remedying of purported previous Voting Rights Act violations. Nevertheless, the Board would exempt itself from the necessity of proving Voting Rights

Act violations by conducting the "searching practical evaluation of past and present reality," *Armour*, 775 F.Supp. at 1049 (quotation taken from Senate Report at 30), required by the Senate Report and by *Gingles*. By exempting itself from the necessity of proof, the Board can thus ignore three critical facts: the absence of racial bloc voting, the fact that black voters have been able to elect both black and white candidates of their choice, and the fact that such candidates have been elected over a sustained period of time. Moreover, by exempting itself from the necessity of proof, the Board may, in the name of "remedy," pack black voters in urban areas and fragment them in suburban areas, politically segregating them and diluting their vote.

If the Board were correct in its premise that there is no legal requirement of proof before a "remedy" is applied, then in the hands of the Board, the voting Rights Act itself becomes a "device" to dilute the voting strength of the protected minority. All "devices," including sophisticated devices, were outlawed by Section 2 of the Act. *Cf. Lane v. Wilson*, 307 U.S. 268, 275 (1939) (noting that Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination.").

Defendants, as well as the dissent from our January 31, 1992 Opinion and Order, distort this aspect of the Court's opinion. They imply that this Court had held that an apportioning board must engage in a totality-of-circumstances analysis prior to any racially conscious redistricting. They similarly imply that this Court held that a state may not anticipate a possible Voting Rights Act challenge and attempt to remedy any potential violation unless it first analyzes the totality of the circumstances. Neither of these contentions is true.

This Court was not faced with mere race-conscious redistricting that sought to avoid the division of contiguous, cohesive concentrations of minorities.

> This Court was also not faced with a plan that simply created a substantial number of majority-minority districts without explanation. Finally, this Court was not faced with a state subject to §5 of the Voting Rights Act, in which case the historical violation of minority rights has been conclusively established. Rather, this Court addressed an Apportionment Board that applied a rule mandating the creation of majority-minority districts wherever possible. The Board did not purport to devise this rule based on Ohio policy and law; rather, it contended that such a *per se* rule is mandated by federal law.

Quilter v. Voinovich, Case No. 5:91CV2219, United States District Court N.D. Ohio Supplemental Findings of Fact, Supplemental Memorandum of Law, and Order, March 19, 1992 at 3.

An opinion in answer to the question of whether the creation of majority-minority districts wherever possible is mandated by federal law, should also discuss why, if such districts are required, they are only required in relation to certain political offices and not others. The Ohio Supreme Court has ruled in *Rogers, supra*, that "evidence" must be adduced to establish a right to elect judges and county commissioners from majority-minority districts where possible. On the other hand, the Ohio Supreme Court has found the 1991 Ohio Legislative Reapportionment Plan constitutional, notwithstanding its creation of majority-minority districts on a *per se* basis. *See, Voinovich v. Ferguson*, 63 Ohio St. 3d 1981 (1992). An obvious conflict exists between these interpretations of the Act. If the presence of a majority-minority voting block alone requires the strictures of State law to succumb, so that majority-minority districts may be formulated for State representative elections, then intellectual honesty and reason require equal

application of this principle to all elections where majority-minority districts can be formulated. This is the issue for review in this matter. It is respectfully requested that if review is granted, that the briefing be expedited and oral argument consolidated with *Voinovich v. Quilter, supra.*

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER OF THE SUPREME COURT OF OHIO

(Decided June 19, 1992)

No. 92-972

THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. DARLENE ROGERS,
Relator,

v.

ROBERT A. TAFT, *et al.*,
Respondents.

[64 Ohio St. 3d 193; 594 N.E.2d 576;
1992 Ohio LEXIS 1735]

June 2, 1992, Submitted and Decided
June 19, 1992, * Announced

* Reporter's Note: On June 2, 1992, the writ of mandamus sought in this case was denied, "consistent with the opinion to follow." 64 Ohio St.3d 1403, 591 N.E.2d 1246. The "opinion to follow" is announced today.

PRIOR HISTORY: IN MANDAMUS.

On May 8, 1992, relator, Darlene Rogers, filed nominating petitions to become a candidate for the Democratic Party's nomination for election to the Sixty-Fourth House District, Ohio House of Representatives. Respondent Mahoning County Board of Elections ("the board") accepted the petitions for the limited purpose of

establishing when they were tendered. Three days later, the board rejected the petitions because they were untimely filed and lacked sufficient signatures.

On May 18, 1992, relator filed her complaint for a writ of mandamus, setting forth three claims for relief: (1) the board had a duty to accept relator's petitions because the United States District Court for the Northern District of Ohio, Eastern Division, reserved a ruling on a request to revise the filing deadline for Mahoning County, where the Sixty-Fourth District is located; (2) the board had a clear duty to validate certain signatures on relator's petitions that were found invalid; and (3) respondent Bob Taft, Secretary of State, had a clear duty pursuant to R.C. 3501.05(C) and (M) to instruct [2] the board to construct so-called majority-minority districts in Mahoning County.

On May 28, 1992, relator filed a motion for summary judgment.

DISPOSITION: Writ denied.

HEADNOTES:

Elections—Mandamus to compel board of elections to accept nominating petitions of candidate for Democratic Party's nomination for election to Sixty-Fourth House District of Ohio House of Representatives—Writ denied, when.

COUNSEL: Bricker & Eckler and Percy Squire, for relator.

Lee I. Fisher, Attorney General, and Cherry Lynne Poteet, for respondent Bob Taft.

James A. Philomena, Prosecuting Attorney, and Sharon K. Hackett, for respondent Mahoning County Board of Elections.

JUDGES: MOYER, *C.J.*, SWEENEY, HOLMES, DOUGLAS, WRIGHT, H. BROWN and RESNICK, *JJ.*, concur.

OPINION BY: PER CURIAM

OPINION: Per Curiam. We reject each of relator's claims for relief, overrule her motion for summary judgment, and deny the writ.

Relator's first claim for relief is based on the recent history of federal litigation involving Ohio's apportionment plans. In 1988, African-American plaintiffs challenged the house district boundary created in Mahoning County under the 1981 state apportionment plan in the United States District Court for the Northern District of Ohio, Eastern [3] Division. On September 4, 1991, the court held that the boundary violated the Fifteenth Amendment to the United States Constitution and the federal Voting Rights Act of 1965. *Armour v. Ohio* (N.D. Ohio 1991), 775 F.Supp. 1044. The court declined to order the state to adopt the plaintiffs' proposed districts because the 1991 apportionment plan was to be published by October 5, 1991; however, the court retained jurisdiction to consider further relief if necessary. That plan ("the 1991 plan") was published, but on January 31, 1992, the same United States District Court held that the plan violated the Voting Rights Act of 1965 in *Quilter v. Voinovich*, _____ F.Supp. _____, No. 5:91 CV 2219. The court in *Quilter* later held a subsequent revision of the 1991 plan, the "1992 plan," unconstitutional on March 10, 1992, _____ F.Supp. _____, and the court then ordered the primary election for the General Assembly delayed until September 8, 1992, and appointed a special master to prepare an acceptable apportionment plan. However, the court's decision in *Quilter* was appealed, and the United States Supreme Court stayed the orders delaying the primary and appointing [4] the special master. *Voinovich*

v. Quilter (1992), 504 U.S. _____, 112 S.Ct. 1663, 118 L.Ed.2d 382. The court later noted probable jurisdiction. *Voinovich v. Quilter* (1992), _____ U.S. _____, 112 S.Ct. 2299, _____ L.Ed.2d _____.

On April 21, 1992, the plaintiffs in *Armour* moved to have the court (1) establish districts in Mahoning County that would maximize African-American voting strengths in elections that would otherwise be at large, (2) order this localized plan published and the voters informed of the districts' configuration, and (3) establish filing qualification dates for candidates.

On April 23, 1992, the court denied this motion in *Armour*, indicating that the 1991 plan, to which a February 20, 1992 filing date applied, would be the vehicle for conducting the primary election. *Armour v. Ohio* (Apr. 23, 1992), N.D. Ohio No. C88-1104Y, unreported. The *Armour* plaintiffs then moved the *Armour* court to stay and reconsider its April 23 order because "potential candidates for nomination did not file petitions under the 1991 Plan in advance of the February 20, 1992 deadline, for the reason [that] they relied on the invalidation of that Plan on January 31, 1992." The *Armour* plaintiffs [5] also requested a show-cause order why the state should not be held in contempt under the April 23 order, as the state was proceeding under the 1992 plan instead of the 1991 plan, as stated in that order.

Before the court acted on the foregoing motion in *Armour*, however, it issued an order in *Quilter* on May 5, 1992, _____ F.Supp. _____, (1) declaring the 1992 plan to be the vehicle for conducting the primary election, (2) setting May 8, 1992 as the filing deadline for districts that were changed as the 1991 plan became the 1992 plan (not including Mahoning County districts), and (3)

reserving to the *Armour* case, further action on the *Armour* plaintiffs' motion for stay, reconsideration, and to show cause, as follows:

"Additionally, the plaintiffs in *Armour v. Ohio* filed a motion asking, inter alia, for the issuance of an order to show cause why the State of Ohio should not be held in contempt of court because use of the 1992 Plan was in conflict with the April 23rd order of the *Armour* court requiring the election to take place under the 1991 Plan. We decline however, to take cognizance of the entire motion, including the request for a show cause order, [6] because the motion was filed in *Armour v. Ohio*. Because we hold that the election may proceed under the 1992 Plan, the *Armour* plaintiffs' other requested relief can be resolved by the *Armour* court at a later date."

The Sixty-Fourth House District was not changed by the 1992 plan. Accordingly, the extension of the filing deadline to May 8, 1992 did not affect relator. However, in her first claim for relief, she argues that respondents have a duty to make the same extension for her because the court in *Quilter* reserved that issue for decision in *Armour*. On the contrary, we do not find that the actions of the federal court create any duty in respondents. Absent a federal court order to change the filing deadline, it remained February 20, 1992. No such order was given. That the federal court reserved the right to make such an order in other pending litigation is not the equivalent of actually making that order. Moreover, as the decision on whether to make such an order is to be made in the *Armour* case, in which relator is a member of the plaintiffs' class, she has an adequate remedy at law in that previously filed action. See *State ex rel. Citizens for Fair Taxation v. Lucas Cty. Bd. of Commrs.* (1992), 63 Ohio St.2d 749, 591 N.E.2d 691. [7]

Similarly, we find no merit in relator's third claim for relief. She claims that respondent Taft's adoption of the position that majority-minority districts must be created wherever possible estops him from denying it in this case, and that R.C. 3501.05(C) and (M) then compel him to instruct the respondent-board to construct, prior to the primary election, such districts in Mahoning County for elections that would otherwise be at large. R.C. 3501.05(C) requires the Secretary of State to "prepare rules and instructions for the conduct of elections"; R.C. 3501.05(M) requires him to "compel the observance by election officers in the several counties of the requirements of the election laws[.]" We find nothing in these statutes requiring the board to act as an apportionment agent, whatever the Secretary of State's views may be, or may have been, on majority-minority districts. Nor has relator adduced any evidence that the state has violated the Fifteenth Amendment to the United States Constitution or the Voting Rights Act of 1965 by providing for election of judges, county commissioners, and others at large instead of from separate districts.

Relator's second claim for relief, to require [8] the board to count certain signatures it rejected on relator's petitions, is equally meritless. The claim is in three parts. First, relator argues that one invalidated "signature" should be restored even though it was not a signature, but was printed. She cites *George A. Ohl & Co. v. A.L. Smith Iron Works* (1933), 288 U.S. 170, 53 S.Ct. 340, 77 L.Ed. 681, and *Benson v. McMahon* (1888), 127 U.S. 457, 8 S.Ct. 1240, 32 L.Ed. 234. In *Ohl*, the United States Supreme Court held that a judge's initials on a bill of exceptions, where the statute required a signature, would be sufficient because "*** the District Judge authenticated his allowance of the bills of exceptions by a form of signature easily and actually identified as his.

No one was misled or injured. We perceive no reason why petitioner should lose its right to have the rulings upon the trial reviewed by the appellate court, merely because the District Judge failed to sign his full name." *Id.*, 288 U.S. at 177, 53 S.Ct. at 342, 77 L.Ed. at 684-685.

Moreover, the *Ohl* court also stated that "the [9] statute contains no indication that the word 'sign' is used in other than the ordinary sense. The statute gives neither definition nor qualification." Id. at 176, 53 S.Ct. at 342, 77 L.Ed. at 684.

In *Benson*, a habeas corpus petitioner contended that he could not be charged with forgery because the alleged act of forgery did not involve a signature, but the printing of a name on concert tickets. The court held that the crime of forgery included falsification by printing.

We do not find *Ohl* or *Benson* persuasive in the present context. First, we examine this issue to determine whether the board has been guilty of fraud, corruption, abuse of discretion, or clear disregard of statutes or other legal provisions. *State ex rel. Beck v. Casey* (1990), 51 Ohio St.3d 79, 554 N.E.2d 1284. Under R.C. 3501.11(K), boards of elections are required to verify petitions. One way of doing this is to check the signature on the petition against the signature required by R.C. 3509.15 on the registration forms on file at the board of elections. Concerning signatures on petitions, R.C. 3501.38(B) states:

"Signatures shall [10] be affixed in ink. Each signer may also print his name, so as to clearly identify his signature."

Thus, the General Assembly obviously did not mean to include printing within the term "signature" as used

in the statute, since the relevant law clearly distinguishes the two. This is an important distinction from the statute in *Ohl.*

Second, in *State ex rel. Green v. Casey* (1990), 51 Ohio St.3d 83, 85, 554 N.E.2d 1288, 1290, we stated that R.C. 3501.38 implicitly requires a cursive signature. In effect, relator asks us to reconsider that decision. We decline to do so on this evidence. Accordingly, we find no fraud, corruption, abuse of discretion or clear disregard of law by the board on this issue.

In the second part of her second claim for relief, relator argues that another rejected signature should be reinstated. The board rejected the signature because the name was signed "Loretta Sheldon" on the petition and "Loretta Floyd-Sheldon" on the registration. Relator contends that Sheldon is, in fact, the voter registered as Floyd-Sheldon.

The board invalidated the signature "since it has no way of knowing whether Loretta Sheldon and Loretta Floyd-Sheldon [11] are the same person." Relator's affidavit stating that "Mary Sheldon [sic]" said she is the same person registered as "Mary Floyd-Sheldon [sic]" is not only inadmissible hearsay, it is not relevant to the issue of Loretta Sheldon's identity. Thus, we hold that the board did not abuse its discretion or otherwise err by refusing to accept the signature of Loretta Sheldon as that of Loretta Floyd-Sheldon. Even if the addresses on the petition and registration form were the same, there was no proof that the signer and the registered voter were the same person rather than different persons living at the same address.

In the third part of her second claim for relief, relator argues that the signatures of five of her petition signers should be reinstated even though they listed an

address on the petition different from the address on file at the board of elections. She admits that precedent is against her on this issue. See *In re Protest Filed by Citizens for the Merit Selection of Judges, Inc.* (1990), 49 Ohio St.3d 102, 551 N.E.2d 150, paragraph three of the syllabus. However, she states that since *In re Protest*, the General Assembly has liberalized [12] voting requirements under R.C. 3503.11 by allowing registered electors in certain cases to notify the board of elections on election day of an address change. See 143 Ohio Laws, Part II, 3658, 3661. She cites this change in the election laws as evidence of a new spirit of liberality that should reverse the result in *In re Protest* and allow persons to sign nominating petitions with their present address, since they may correct the registration address on election day. However, while liberalized registration under R.C. 3503.11, the General Assembly left intact R.C. 3501.38(C), which states:

"Each signer shall place on the petition after his name the date of signing and the location of his voting residence, including the street and number if in a municipal corporation or the rural route number, post office address, or township if outside a municipal corporation. The voting address given on the petition shall be the address appearing in the registration records at the board of elections." (Emphasis added.)

The General Assembly having failed to amend this pointed and relevant section, we conclude that it did not wish to extend the spirit of liberality to the signing of petitions. [13] Accordingly, we find no fraud, corruption, abuse of discretion, or clear disregard of law in the board's rejection of these signatures.

"In order to grant a writ of mandamus, a court must find that the relator has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law." *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42, 15 O.O.3d 53, 399 N.E.2d 81, paragraph one of the syllabus. Relator having failed to establish all three of these elements in any of her claims for relief, we hereby deny the writ.

Writ denied.

MOYER, *C.J.*, SWEENEY, HOLMES, DOUGLAS, WRIGHT, H. BROWN and RESNICK, *JJ.*, concur.

BARNEY QUILTER, ET AL. V. GEORGE V. VOINOVICH, ET AL., N.D. OHIO, NO. 5:91-CV-2219, FINDINGS OF FACT, SUPPLEMENTAL MEMORANDUM OF LAW AND ORDER

(Filed March 19, 1992)

Case No. 5:91-CV-2219

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

FINDINGS OF FACT, SUPPLEMENTAL MEMORANDUM OF LAW, AND ORDER

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

Pursuant to Fed. R. Civ. P. 62(c), Defendants have moved this Court to stay its Order of March 10, 1992 pending appeal to the United States Supreme Court. The Defendants attached a Memorandum in Support, and the Plaintiffs, pursuant to this Court's direction, have submitted a Memorandum in Opposition to Defendants' Motion to Stay Pending Appeal.

In our Opinion and Order decided and filed January 31, 1992 ("Opinion"), we noted that "[t]he exigencies of the situation, which include satisfying deadlines, have required counsel for the parties to formulate and present their positions with commendable speed, and have similarly imposed upon this panel a mandate to record the conclusions reached as rapidly as possible." Opinion at 17 n.2. Nonetheless, this Court is fully aware of its obligation to make more detailed findings of fact and conclusions of law. Accordingly, this opinion and order has a dual purpose: to respond to the motion for stay pending appeal and to more fully develop our legal conclusions and the factual support therefor.

[2] I.

Defendants' motion to stay the Opinion and Order of the Court dated March 10, 1992 is based upon the same flawed legal premises previously rejected by this Court. In the context of the four-part test for stays pending review, Defendants argue, once again, that they may undertake to "remedy" unproven Voting Rights Act violations on a wholesale, statewide basis without performing a legally adequate totality-of-circumstances analysis; that Ohio should be treated for Voting Rights Act purposes as if it were a §5 state; that this Court's opinions are contrary to the Supreme Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), as well as "every decision issued regarding the creation of majority-minority districts," Memorandum in Support at 5; and that, unless the Court stays the effect of its order enjoining Ohio's May 5, 1992 primary, political chaos will erupt throughout the state. Each of these arguments is without legal foundation or factual support.

II.

There are two principal authorities to which this Court has directed the parties' attention. These are the legislative history of the Voting Rights Act as set forth in the Senate Report on that Act and the *Gingles* decision of the Supreme Court. With respect to the authoritative nature of the Senate Report, the Supreme Court has stated, "[w]e are not persuaded that the legislative history of amended §2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill." *Gingles*, 478 U.S. at 43 n.7. Although *Gingles* cannot be automatically applied outside the context of multimember districting schemes, *see, e.g., Armour v. Ohio*, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991), *Gingles* remains the Supreme Court's landmark opinion explaining §2 of the Voting Rights Act; it has been cited in the briefs of both sides herein as controlling authority with regard to racial bloc voting.

[3] Both *Gingles* and the Senate Report state that violations of the Voting Rights Act must be proven, not assumed, as a predicate for remedial action. In this regard, the Court in *Gingles* stated:

> Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multimember district. By recognizing the primacy of the history and extent of minority

> electoral success and of racial bloc voting, the Court simply requires that §2 plaintiffs prove their claim before they may be awarded relief.

Gingles, 478 U.S. at 48 n.15.

The Senate Report is equally clear, particularly with respect to proof concerning racial bloc voting:

> The results test *makes no assumptions one way or the other* about the role of racial political considerations in a particular community. If plaintiffs assert that they are denied fair access to the political process, in part, because of the racial bloc voting context within which the challenged election system works, they would have to prove it.

S. Rep. No. 417, 97th Cong. 2d Sess. 34 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 212.

Defendants, as the majority of the Apportioning Board, have proclaimed their mission to be the remedying of purported previous Voting Rights Act violations. Nevertheless, the Board would exempt itself from the necessity of proving Voting Rights Act violations by conducting the "searching practical evaluation of past and present reality," *Armour*, 775 F. Supp. at 1049 (quotation taken from Senate Report at 30), required by the Senate Report and by *Gingles*. By exempting itself from the necessity of proof, the Board can thus ignore three critical [4] facts: the absence of racial bloc voting, the fact that black voters have been able to elect both black and white candidates of their choice, and the fact that such candidates have been elected over a sustained period of time. Moreover, by exempting itself from the necessity of proof, the Board may, in the name of "remedy," pack black voters in urban areas and fragment them in suburban areas, politically segregating them and diluting their vote.

If the Board were correct in its premise that there is no legal requirement of proof before a "remedy" is applied, then in the hands of the Board, the voting Rights Act itself becomes a "device" to dilute the voting strength of the protected minority. All "devices," including sophisticated devices, were outlawed by Section 2 of the Act. *Cf. Lane v. Wilson*, 307 U.S. 268, 275 (1939) (noting that Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination").

Defendants, as well as the dissent from our January 31, 1992 Opinion and Order, distort this aspect of the Court's opinion. They imply that this Court had held that an apportioning board must engage in a totality-of-circumstances analysis prior to any racially conscious redistricting. They similarly imply that this Court held that a state may not anticipate a possible Voting Rights Act challenge and attempt to remedy any potential violation, unless it first analyzes the totality of the circumstances. Neither of these contentions is true.

This Court was not faced with mere race-conscious redistricting that sought to avoid the division of contiguous, cohesive concentrations of minorities. This Court was also not faced with a plan that simply created a substantial number of majority-minority districts without explanation. Finally, this Court was not faced with a state subject to §5 of the Voting Rights Act, in which case the historical violation of minority rights has been conclusively established. Rather, this Court addressed an Apportionment Board that applied a rule mandating the creation of majority-minority districts wherever possible. The Board did not purport to devise [5] this rule based on Ohio policy and law; rather, it contended that such a per se rule is mandated by federal law.

In this context, the dissent criticized our Opinion for focusing on the process of redistricting rather than its effects.[1] It is the process, however, that violates the text of the Voting Rights Act: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. §1973(b) (1988). Although "neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment," the Supreme Court has upheld the creation of majority-minority districts only in the context of §5 of the Act: "the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to assure that its reapportionment plan complies with §5." *United Jewish Organizations, Inc. v. Carey,* 430 U.S. 144, 161 (1977). The implication is clear: the creation of majority-minority districts wherever possible is a remedy, not a right.

Nonetheless, this Court took a broad view of the Act. If officials of the state of Ohio seriously wish to concede that they have, in the past, intentionally and purposefully discriminated against minorities statewide, and that theirs is a state with a legacy of legally significant racial bloc voting, then this Court would be required to conclude that Congress had erred in excluding Ohio from the list of states subject to the Voting Rights Act. As discussed *infra* part III, this was essentially the approach of the court in *Garza v. County of Los Angeles,* 918 F.2d 763 (9th Cir. 1990), *cert. denied,* 111 S. Ct. 681 (1991). If difficulty in electing candidates of choice and racial bloc voting are not proven, however, then the key elements upon which a "remedy" must be

[1] Focusing on the process, however, is entirely appropriate, because like the *Jeffers* court, *see infra* part III, we mandate no particular result.

premised are missing. As the record [6] demonstrates, legally significant racial bloc voting was *not* shown in Ohio to have prevented black voters from electing representatives of their choice in *any* district other than the two districts (51 and 52) addressed by the court in *Armour*. There is simply no proof to support a finding of the inability of black voters either to elect candidates of their choice or to affect the election of candidates of their choice in given legislative districts.

Indeed, the issue here is not whether the Board should be permitted to redress proven wrongs, but instead, whether the Board should be permitted to destroy what is right in Ohio—that is, coalitional voting. As is shown by evidence introduced by both parties, the white crossover vote for black legislative candidates was very substantial, usually more than 50%.[2] Such voting is

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[2] Instead of the racial bloc voting that the Defendants contend has characterized House legislative races in which minorities were candidates, Dr. Henderson performed a bivariate analysis for the election years 1990, 1986, and 1984, showing that there was highly coalitional voting in each of those elections.

Minority Rep.	*White Crossover Vote (%)*
T. James	63.71
C. Prentiss	51.65
V. Whalen	67.55
W. Mallory	50.66
H. Rankin	50.93
R. Miller	44.50
O. Beatry	50.25
R. McLin	35.44
T. Roberts	45.98
V. Sykes	48.76
C. Jones	44.46

Dr. King, the Defendants' expert, criticized Dr. Henderson's analysis, and used a different approach, but nevertheless, Dr. King concluded that, on average in statewide races, 95% of blacks voted for black candidates and 56.7% of whites voted for black candidates and thereby, confirmed Dr. Henderson's conclusions. Apportionment Board Hearing, February 11, 1992, at 48-49.

not legally significant racial bloc voting,[3] rather, it is coalitional voting, and this coalition of black and [7] white voters is the target of the Board's plan. The Voting Rights Act was not designed to serve the purpose of preventing coalitional black and white voting.

While the Board argues that it should be found exempt from the necessity of a "totalities" analysis, its fallback position is that it has satisfied that analysis. It points to the "new" evidence that it has submitted. This new evidence, however, fails to connect the socioeconomic statistics presented to any proven inability of black voters either to elect or affect the election of candidates of their choice. Even in the unfortunate circumstances where blacks continue to suffer the social and economic effects of past discrimination, it must still be proven that there is a substantial inability to elect candidates in the areas at issue. *See Gingles,* 478 U.S. at 48 n.15. No such proof was even proffered by the Board.

III.

In its January 31, 1992 Order and Opinion, this Court stated, "[t]he language of §2 of the Voting Rights Act contains no requirement for majority-minority districts," Opinion at 8, recognizing that, "where the

[3] Dr. King, however, like Mr. Tilling, chooses to ignore the *Gingles* qualifier "legally significant" and opines that there is polarized voting wherever blacks and whites differ in the amounts of their votes. Even so, King does not challenge Henderson's results. Dr. King's regression analysis reflects the average proportion of whites voting for black incumbents in the years 1980-1990 as follows: 1984—56.7%; 1986—60.2%; 1988—67.8%; and 1990—61.5%. Oddly, Dr. King finds racial bloc voting by subtracting the percent of white voters voting for black candidates from the percent of black voters voting for black candidates. Testimony of King, Feb. 18 Hearing at 48-49. Under this analysis, the only situation where racial bloc voting would not exist would be where black voters support black candidates in smaller numbers than white voters. *Id.*

creation of majority-minority districts wastes minority votes by packing and dilutes minority influence by fragmenting, the result is an 'abridgement of the right . . . to vote on account of race or color' which *violates* the Voting Rights Act," *Id.* at 8-9 (emphasis added).

The Defendants originally relied on *Thornburg v. Gingles*, 478 U.S. 30 (1986) and *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) to support their per se approach.[4] Consequently, this Court reviewed *Gingles* and found "nothing in [8] *Gingles* which establishes a *per se* requirement for the creation of majority-minority districts." Opinion at 10. This Court also reviewed *Armour* and concluded that "*Armour* does not stand for the proposition that persons responsible for apportionment should create majority-minority districts wherever possible." *Id.* at 11. Without distinguishing our reading of *Gingles* or *Armour*, the Board cites four cases that allegedly "require a state to affirmatively address the dilution of minority voting strength in the apportionment process whenever the opportunity to do so exists." Memorandum in Support at 5-6. These cases are: *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977); *Beer v. United States*, 425 U.S. 130 (1976); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); and *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd mem.*, 111 S. Ct. 662 (1991). *United Jewish Organizations* and *Beer* are §5 cases. *Garza* is a case in which there had been repeated intentional violations of the Fourteenth and Fifteenth Amendments. *Jeffers* is a case in which the court found a violation of §2 of the Act and instituted creation of majority-minority districts as a *remedy*.

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[4] On a number of occasions, Mr. James Tilling, allegedly speaking as the Board's agent, referred to *Armour*, *Gingles*, and the 1982 amendment to the Voting Rights Act to erroneously justify his belief that the Board Majority had a legal obligation to create majority-minority districts wherever possible.

Ohio is not now, and has never been, subject to the preclearance requirements of §5 of the Voting Rights Act. The Voting Rights Act was passed in 1965 because "[t]raditionally, black Americans were denied the franchise throughout the South." Senate Report, at 5, *reprinted in* 1982 U.S.C.C.A.N. at 182. The Act operates on two levels: first, §5 of the Act requires "covered jurisdictions" to preclear any changes in voting or election laws, and second, §2 of the Act prohibits discriminatory practices nationwide. *Id.* at 5-6, *reprinted in* 1982 U.S.C.C.A.N. at 182-83. The §5 "covered jurisdictions" were established in 1965, and the preclearance requirements were extended in 1969, 1970, and 1975, because Congress made "a careful review of the contemporaneous record of ongoing voting [9] rights discrimination" in areas affected. *Id.* at 8-9, *reprinted in* 1982 U.S.C.C.A.N. at 185-86.

There is a profound and distinct difference between §5 and §2 of the Voting Rights Act. In §5 localities, the inability of minorities to participate equally in electoral processes has already been proven by the legislative findings of Congress. Racial bloc voting and the inability to elect or affect the election of candidates of choice were proven; these were but two of the myriad of the proven elements that deprived blacks of their electoral franchise in these covered jurisdictions. Hence, these facts did not have to be proven under a totalities test in a §5 area; they could properly be assumed. The "results" test of §2, however, made no such assumptions. The Senate Report explains the necessity of examining local circumstances carefully and avoiding mechanistic rules:

> The basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated provides adequate assurance, without disturbing the prior case law or prescribing in the statute mechanistic rules for formulating

> remedies in cases which necessarily depend upon widely varied proof and local circumstances. The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

Id., at 31, *reprinted in* 1982 U.S.C.C.A.N. at 208.

States which are subject to §5 of the Voting Rights Act must submit proposed apportionment plans for approval to the Attorney General or a three-judge court. 42 U.S.C. §1973c. With respect to states subject to §5, there has been a prior determination that the discriminatory voting practices of that state have been so substantial that future redistricting plans are automatically suspect and remain so until the Attorney General or a court approves the particular plan in question:

> It is evident that the Act's prohibition against instituting new voting procedures without the approval of the Attorney General or the three-judge District Court is [10] *not dependent upon proving past unconstitutional apportionments* and that in operation the Act is aimed at preventing the use of new procedures until their capacity for discrimination has been examined by the Attorney General or by a court.

Carey, 430 U.S. at 157 (emphasis added).

Those drafting an apportionment plan for a state subject to §5 must operate upon the assumption that racially discriminatory practices or procedures with respect to voting rights exist or existed and, consequently, must draft the plan accordingly. Thus, it is proper, and in some instances required, that a §5 state draw majority-minority districts without first

determining whether a "searching practical evaluation of the past and present reality" supports such creation. In fact, the Supreme Court, in the context of §5, stated:

> *Beer* established that the Voting Rights Act does not permit the implementation of a reapportionment that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." This *test* was satisfied where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority. But if this test were not met, clearance by the Attorney General or the District Court for the District of Columbia could not be given, and the reapportionment could not be implemented.

Id. at 159 (quoting *Beer v. United States*, 425 U.S. at 141) (emphasis added) (citations omitted). Although Defendants quote this language, they take it out of context by failing to note that the Court was specifically addressing §5. The "test" referred to by the Court was the test articulated in *Beer*, where the Court was addressing a §5 state's submission of its proposed plan for councilmanic districts for approval. "In *Beer v. United States*, 425 U.S. 130 (1976), the Court considered the question of what criteria a legislative reapportionment must satisfy under §5 of the Voting Rights Act to demonstrate that it does not have the 'effect' of denying or abridging the right to vote on account of race." *Carey*, 430 U.S. at 159.

[11] *Garza*, although it is not a §5 case, has all of the earmarks of a §5 case. There, the trial court found, and the court of appeals confirmed, that intentional discrimination had been practiced for decades against the Hispanic minority. *Garza*, 918 F.2d at 771. The Court found that, since at least 1959 and continuing in 1965, 1971, and 1981, Hispanic voters had been deliberately fragmented to dilute the effect of their vote on future

elections, and that despite this evidence, the apportioning body had refused to draw the necessary majority-Hispanic district. *Id.* at 766-769. The court then accepted a plan that drew the required district.

In *Garza*, not only was the totalities test satisfied, but the even stricter test of *City of Mobile v. Bolden*, 446 U.S. 55 (1980)—intentional discrimination—had also been met. *See Garza*, 918 F.2d at 771. Accordingly, *Garza* does not stand for the proposition that a Board must draw majority-minority districts wherever possible, in the absence of conclusive proof of a Voting Rights Act violation. Rather, *Garza* indicates that such a district will be drawn by the court only where there is proof of intentional discrimination extending over many years.

In *Jeffers*, the court addressed a §2 voting rights challenge. Nonetheless, even when promulgating its *remedy* for a *proven violation*, the court expressly disclaimed a contention that it was mandating the creation of any particular number of majority-minority districts:

> *We are not holding that the law requires the creation of any particular number of majority-black districts.* We know, and have found in this opinion, how many such districts can be created, and we also know that their lines can be drawn as to make them reasonably compact and contiguous. There is, therefore, a sort of presumption that any plan adopted should contain that number of majority black districts. There may be practical problems which we cannot foresee, though, and we are not foreclosing our duty to consider them after both sides submit their plans.

Jeffers, 730 F. Supp. at 217 (emphasis added). The *Jeffers* court not only expressly disclaimed the contention that it was requiring the creation of majority-black [12] districts, it in fact found that the creation of majority-black districts was the only way to overcome

the invidious racial discrimination existing in Arkansas' political and electoral processes. Indeed, it was the high degree of racial bloc voting present in Arkansas, outside Pulaski County, that caused the court to endorse the maximization of majority-minority districts:

> it is true here, . . . that there is racially polarized voting in races for the Arkansas State Legislature, that black voters usually vote cohesively, as a unit, and that white voters have the strength under the present plan of apportionment (except in majority-black districts) to enable them to frustrate the choices made by black voters.

Id., at 209 (citation omitted). Such racial bloc voting, warranting the per se creation of majority-minority districts, is not present in Ohio. Indeed, substantial coalition voting between the races exists in Ohio, where white crossover voting contributes to the election or reelection of all eleven of the black Ohio state legislators.

Contrary to this Court's recognition of the vital importance of following the proper process and avoiding the pitfalls of a per se application of majority-minority districting, the Board would arrogate to itself the unreviewable discretion to determination where and to what extent there existed dilution of minority voting strength. With such unchecked power to determine dilution, an apportioning body, acting cynically, would be able to pack and fragment black voters at its political whim. Given the total absence of proof of legally significant racial bloc voting, the issue presented by the Board's argument is quite simple: whether an apportioning board should have unlimited discretion to apply the Voting Rights Act without a totalities analysis.

Gingles held that a trial court, in determining "whether the political process is equally open to minority voters," must (1) consider the "totality of the

circumstances" and (2) conduct "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 (quoting [13] *Rogers v. Lodge*, 458 U.S. 613, 621 (1982)). If a federal trial court, trained in fact finding and expert at legal analysis, is required to make a "searching practical evaluation of past and present reality" and an "intensely local appraisal of the design and impact of the contested electoral mechanisms," *id.*, it would seem to follow, a fortiori, that a Board of laypersons, politically motivated, should not be held to a lesser standard. Whether such a Board is competent in the first instance to make the necessary totalities evaluation required by the Voting Rights Act is, of course, an issue that is open to serious challenge, but one that we have answered in the affirmative.

Defendants have not and cannot cite to a single case, involving violations of §2 of the Voting Rights Act, that stands for, or even lends support to, its proportion that federal law, in the absence of a proven §2 violation, requires per se creation of majority-minority districts wherever possible. Furthermore, both of the §5 cases cited by Defendants to support their per se approach were decided prior to the 1982 amendment to the Voting Rights Act, which together with its legislative history, unambiguously sets forth the requirements for establishing a violation of §2 of the Voting Rights Act.

The Defendants argue that this Court, itself, did not conduct a totalities evaluation to justify its finding that the Board violated the Voting Rights Act. This argument is rather clever sophistry. Having implemented the Voting Rights Act remedy in the absence of a violation, Defendants suggest that we are now required to establish a violation as a rerequisite to removing the remedy. Actually, however, this task is not as difficult as it seems. The totality of circumstances reveals coalitional

voting between whites and blacks. As a result, black candidates have been repeatedly elected from districts with only a 35% black population.[5] Against [14] this background, the per se requirement of the creation of majority-minority districts has a dilutive effect on black votes[6]—exactly what the Defendants intended. It is no defense to say that the concentration and dispersal of

[5] There is only one district in the last twenty years that had more than thirty-five percent African-American population but did not elect an African-American. The exception was Senate District 25 in Cleveland, which elected Lee Fisher, subsequently and presently the elected Attorney General of Ohio. Thirty-five percent is considered adequate to elect a black person in Ohio because Ohio does not have the history of racial polarization in voting. Deposition of Horn at 98-99.

[6] Henderson states that the significance of the size of the white crossover vote in the 11 minority districts is important because it is clear evidence of coalitional voting, by which he means that a significant portion of white voters are willing to vote for the candidate of choice of black voters. Henderson states that the existence of substantial white crossover voting means that the plan drawer must take particular care to avoid packing of minority voting strength. Deposition of Henderson at 23. He also states that the size of the white crossover vote provides one measure or criterion by which you may assess what the dividing line is between packing and not packing minority voting strength. *Id.*

On this point, the dissent notes that "[b]y way of summary, the 1991 Apportionment Plan creates four (4) majority-minority districts in Cuyahoga County with a black voting age population of 58.36%, 61.41%, 65.13% and 63.42%. The prior 1981 districts had only three (3) majority-minority districts with a black population of 74.80%, 90.05%, and 94.67%. The 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter similarly has four majority-minority districts with black voting age populations of 60.18%, 63.71%, 66.67% and 67.08%." Dissent at 10.

First both parties seem to agree with the changes Cuyahoga County. Second, the Defendants and the dissent constantly rely on these types of comparisons, yet they are not legally relevant. The 1981 apportionment of Cuyahoga County was never found to violate the Voting Rights Act. Similarly, the Democrats' proposed plan is irrelevant in this context for the simple reason that it is not, nor has it ever been, the apportionment plan of Ohio.

black voters is being done on a benevolent basis to guarantee the election of black candidates, as the Board would argue. The Board's argument is nothing less than an argument for proportional representation. Section 2 of the Voting Rights Act makes it clear that, the totality of the circumstances aside, nothing in that section "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973(b).

Furthermore, the Board cannot seriously contend that it did not apply its "remedy" intentionally[8] and for political advantage[9] in violation of the Fifteenth [15] Amendment. These facts clearly establish (1) actual intent to discriminate and (2) injury as a direct result of

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[7] Interestingly, Ohio is apparently unique in that proportional representation would be a step backward for African-Americans in Ohio, at least as far as the House is concerned. The black minority population in Ohio is predominently located in its six major urban counties of Cuyahoga (24.9%), Franklin (15.9%), Hamilton (10.9%), Montgomery (17.7%), Summit (11.9%), and Lucas (14.8%). Those six counties account for approximately forty-four of the ninety-nine house districts and are presently represented by 11 minority representatives even though the total black population of the six counties (according to 1990 census figures) is only 19.1% of the total population of the six counties.

[8] Tilling states that, in the most populous counties, he drew boundaries in accordance with his understanding of the requirements of the Voting Rights Act first. Deposition of Tilling, 11/22/91, at 49. There were times when he would cross Ohio political boundaries in order to comply with his understanding of the Voting Rights Act. *Id.* at 51-52. If there had been no Voting Rights Act requirement to create majority-minority districts, he understood that he would not have had to cross Ohio political boundaries. *Id.* at 52. He followed his understanding of the concept of federal supremacy and drew the lines as he perceived the Voting Rights Act required. *Id.*

[9] We offer the following as examples. Tilling had the "Republican Opportunities" document prior to his submission of the plan and while he was drawing the plan. Deposition of Tilling, 11/22/91 at 17-19. Henderson states that he considers Exhibit 11 to be a roadmap detailing how you create a racial gerrymander. Deposition of

(Footnote continued on following page.)

discrimination. *See Garza*, 918 F.2d at 771. It is well established that intentional dilution for political reasons sustains a Fifteenth Amendment claim. *See Armour*, 775 F. Supp. at 1060-61.

IV.

The Defendants, despite having had two opportunities to draw a lawful apportionment plan over a period of many months, have now asked the Court to stay its March 10, 1992 Order because they have not had a reasonable opportunity to adopt a substitute plan. Defendants tell only half the story by stating that this Court's order only gave them the opportunity to reconsider the plan to show justification for the creation of majority-minority districts. This Court ordered the Board to reconsider its plan, stating "[u]nless it can show justification under the totality of circumstances test for the present configuration, the Board must submit a revised plan to this court within 20 days of the date of this order." Opinion at 16. Thus, the Board had two options: (1) properly evaluate the totality of circumstances and, if the outcome justifies the plan's creation of majority-minority districts, submit that evidence to the Court or (2) submit a revised plan. The Board clearly chose option 1.

(Footnote continued from preceding page.)

Henderson at 57. Robert Bennett, Chairman of the Ohio Republican Party, understood that creation of majority-minority districts would benefit Republicans. Deposition of Bennett, *passim*. On the "Let's Pretend" documents referring to Hamilton County, it states: "In this 'Republican' county the strategy is to 'pack' as much of the Democrat minority as possible into two heavily Democratic districts with black majorities." Deposition of Lawrence at 75-76. Mr. Horn's whole objective was to create what he was calling a Republican gerrymander. *Id.*

For incorporation of all these concepts, see generally Deposition of Horn, *passim*.

[16] The Defendants' arguments for a stay, based on the assertions that the Court has misread, misapplied, and otherwise misinterpreted the basic law applicable to voting rights, do not support an optimistic view that the Defendants are now prepared to follow the Court's orders. Accordingly, the appointment of the Special Master was essential.[10]

Specifically addressing the criteria for a stay pending appeal, the only irreparable harm that the Defendants suggest would occur to them is that their plan may become moot because a lawful plan may be adopted consistent with the Court's order. This is not the sort of irreparable harm recognized in law. A party is not irreparably harmed if its unlawful plan is not implemented.

The Defendants also argue that the class of black voters who were both packed and fragmented by the Board's plan will not be injured, because they will in no way be prohibited from "effectively participating." Memorandum in Support at 18. If this means that black voters, like all other voters, will be entitled to vote, the argument begs the question. The right to vote encompasses the right not to have one's vote unlawfully diluted. The following excerpt from the Senate Report puts this right in the proper perspective:

> The principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims*. The Supreme Court based its ruling on the fundamental view that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized" because "the

[10] In response to the dissent, we note only that we know of no authority that requires this Court to delineate all of its instructions in the order appointing the Master, which history indicates is often self-defeating.

> right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."
>
> In defining the basic dilution principle, the Supreme Court observed:
>
> > "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or [17] the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted."

Senate Report at 19, *reprinted in* 1982 U.S.C.C.A.N. at 196 (footnote omitted) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 n.29, 562 (1964)).

The Defendants contend that the most significant harm occasioned by not granting a stay will be public uncertainty. Contrary to this suggestion, the confusion resulting from granting a stay would be far greater than the alternative of the orderly process put in place by this Court. This Court takes notice that, for reasons unrelated to this litigation, the congressional redistricting of the state of Ohio has not been concluded as of the time of this filing. Accordingly, the timetable established by the Ohio statutes and required to be followed by the Secretary of State, Mr. Taft, a defendant herein, cannot be observed, and the May 5, 1992, primary election must be postponed, in any event, to a later date. Staying the Court's Order would not resolve the time pressures caused by this delay.

Moreover, the granting of a stay would arguably put the 1991 plan back into effect, since the 1992 plan is simply a "remedy" that was submitted to the Court and

which has been rejected. If the proposed 1991 plan is put into effect, even greater confusion will follow. Setting aside the Court's order would expose the candidates and the public to the possibility that primary elections might be held in districts different from the general election. The unlawful nature of the 1991 legislative boundaries that were drawn on the basis of race is clear. The necessity of conducting elections within boundaries that are lawful can be achieved by following the process that the Court has in place. To abandon that process would require a determination that African-Americans must be concentrated in majority-minority districts wherever possible, a political theory finding support in neither the Voting [18] Rights Act nor in decisions interpreting that Act. For the foregoing reasons, Defendants' Motion to Stay Pending Appeal is DENIED.

V.

As of the date of this opinion, a special master is in the process of drawing a constitutional plan for the State of Ohio. In this regard, the majority of this Court has issued a series of specific instructions, one of which involves the Fourteenth Amendment. In its present posture, this issue is moot, because Special Master Kane will comply with the Fourteenth Amendment. For purposes of completeness, however, we note that both the 1991 and 1992 plans violated the Fourteenth Amendment.

"The Equal Protection Clause requires that legislative districts be of nearly equal popoulation, so that each person's vote may be given equal weight in the election of representatives." *Connor v. Finch*, 431 U.S. 407, 416 (1977). The Supreme Court applies a 10% total

deviation[11] rule; deviations in excess of that amount require justification by compelling, legitimate state interests. *See White v. Regester*, 412 U.S. 755, 776-77 (1973) (Brennan, J., dissenting) (stating the general rule that emerges from the majority's holding). Ordinarily, Ohio's provision of a plus or minus 5% *deviation* matches the requirement of a 10% *total deviation*.

The Apportioning Board, however, twice set aside the 5% standard. As the dissent notes in its findings regarding the apportionment process:

> single member county districts are mandated in the event the country's total population is with 5% of the ideal number. Four Ohio counties, Warren, Wood, Allen and Columbiana, fell within that computation for 1991. *The apportionment board may also create single member districts for counties with a total population* [19] *that is within 10% of the ideal number.* The 1991 plan includes in that latter category an additional three counties, Fairfield, Wayne and Ashtabula.

Dissent at 7 (emphasis added).[12] The second violation occurred in Senate District 32, which has only 94.6% of the ideal district ratio.

Both deviations were justified, erroneously, by the need to observe county lines. It is well recognized that, under the Fourteenth Amendment, standard districting

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[11] Total deviation is arrived at by adding the percentage above the ideal district population of the most overpopulated district to the percentage below the ideal district population of the most underpopulated district. Thus, a districting criterion that allows a *deviation* of plus or minus 5% would, generally speaking, yield a *total deviation* of 10%. *See, e.g., Connor v. Finch*, 431 U.S. 407, 416-17 (1977) (finding that 8.2% above the norm and 8.3% below the norm yield a total deviation, or "maximum deviation from population equality," of 16.5%).

[12] Note, however, that the dissent misconstrues what the Supreme Court means by deviation. *See* Dissent at 18. A 10% deviation, of course, has the potential to yield a 20% total deviation.

criteria, such as respect for city or county boundaries, must give way to the equal population standard if there is an unavoidable conflict. *See, e.g., Jeffers v. Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989) ("The one-person, one-vote rule inevitably requires that county lines and natural barriers be crossed in some instances, and that cities and other political and geographic units be split in others."), *aff'd mem.*, 111 S. Ct. 662 (1991). Accordingly, the Board fails to provide sufficient justification for its violation of the 10% total deviation rule.

/s/ NATHANIEL R. JONES
Nathaniel R. Jones
Circuit Judge

/s/ JOHN W. PECK
John W. Peck
Senior Circuit Judge

BARNEY QUILTER, ET AL. V. GEORGE V. VOINOVICH, ET AL., N.D. OHIO, NO. 5:91-CV-2219, OPINION AND ORDER

(Decided and Filed May 5, 1992)

No. 91CV-2219

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BARNEY QUILTER, *et al.*,
Plaintiffs,

versus

GEORGE V. VOINOVICH, *et al.*,
Defendants.

OPINION AND ORDER

Before: JONES, *Circuit Judge*, PECK, *Senior Circuit Judge*, and DOWD, *District Judge*.

PECK, *Senior Circuit Judge*. This complex case, or rather series of cases, had its origin in *Armour v. Ohio* which was filed in the District Court for the Northern District of Ohio in 1988. The district judge to whom the case was assigned referred it to a magistrate who recommended denial of relief for the plaintiffs. The district court adopted the magistrate's recommendation. On appeal to the Sixth Circuit Court of Appeals, the decision of the district court was reversed by the court sitting en banc, 925 F.2d 987 (6th Cir. 1991), which remanded with directions to certify the case to the Chief Circuit Judge for the appointment of a three-judge court

under the provisions of 28 U.S.C. §2284. Challenged in that case was the plan devised and promulgated by the Ohio Apportionment Board [2] which is charged under the Ohio constitution with the drawing of the districts from which the members of the Ohio General Assembly which consists of the House of Representatives and the Senate, are elected. The specific plan under attack was adopted by the board in 1981. The three-judge court appointed pursuant to the certification held that a voting district boundary line in Mahoning County which split a large cohesive black population between two districts violated the Voting Rights Act and the fifteenth amendment, 775 F. Supp. 1044 (N.D. Ohio 1991). No appeal to the Supreme Court was perfected from that decision.

The present action placed the validity of the apportionment plan promulgated in 1991 as it applied to the entire state at issue. This court held the plan to be invalid in a two to one decision. *Quilter v. Voinovich*, No. 5:91-CV-2219 (N.D. Ohio Jan. 31, 1992). Thereafter, the Apportionment Board prepared another plan which this court decided, by a divided court, to be unconstitutional. No. 5:91-CV-2219 (N.D. Ohio Mar. 10, 1992). That plan was neither published nor promulgated as required by the Ohio constitution and one of the issues in the present case is whether that plan was in fact a new plan or simply a revision containing "technical corrections" of the 1991 Plan, as contended by the defendants. We hold that the "technical corrections" were so extensive and pervasive that the resulting document constituted a new plan, hereinafter referred to as the 1992 Plan.

Meanwhile, two original actions involving additional aspects of the entire situation were filed in the Supreme Court [3] of Ohio, which were removed to the district court for the Southern District of Ohio. Neither of those actions is directly involved herein at this juncture. This

court appointed a Special Master charged with the responsibility of preparing a plan of redistricting, authorizing him to employ such technical assistance as was deemed necessary for the drafting of the plan, and providing that the cost of this process be assessed against the state of Ohio. On application of the defendants, the Supreme Court of the United States issued on April 20, 1992, an order staying orders of this court entered March 10 and 31. Thereafter, the Special Master filed a Status Report and Request for Instructions pointing out that the plan he had been directed to prepare was 75% to 80% complete, that completion could be accomplished within a matter of days, but that if discontinued at that time would be more difficult and time consuming, and therefore more expensive, to complete at a subsequent time. In response, we ordered the Special Master to proceed to complete the plan, then to file it with this court under seal in order to be available in the event the Supreme Court feels that it may be of assistance. It is parenthetically observed that the members of this court are not aware of the details nor of the thrust of the proposed report, and when and if such a plan is filed under seal its integrity will be maintained pending further instructions from the Supreme Court.

Meanwhile, the passage of time placed the date of the primary election in jeopardy and has placed the political process in a hazardous position. Originally scheduled for May [4] 5, 1992, it was rescheduled by order of this court for September 8, 1992, but is presently scheduled to be conducted June 3, 1992. The Secretary of State of Ohio, who is the chief elections officer of the state, formally advised the Boards of Elections of the eighty-eight counties in the state to do all acts necessary for the conducting of the election on the latter date. Additionally, the plaintiffs in *Armour v.*

Ohio filed a motion asking, *inter alia*, for the issuance of an order to show cause why the state of Ohio should not be held in contempt of court because use of the 1992 Plan was in conflict with the April 23rd order of the *Armour* court requiring the election to take place under the 1991 Plan. We decline, however, to take cognizance of the entire motion, including the request for a show cause order, because the motion was filed in *Armour v. Ohio*. Because we hold that the election may proceed under the 1992 Plan, the *Armour* plaintiffs' other requested relief can be resolved by the *Armour* court at a later date.

The need for a resolution of the issues in this case has become critical because of the time requirements and cut-off dates for the filing of nominating petitions, other periods established by state statutes and regulations, and allowance for time for the printing of ballots and incidental literature. A full literal compliance with the administrative time requirements would necessitate a rescheduling of the announced date for the primary. The election officials are therefore empowered and directed to make such truncations of time periods or other appropriate adjustments to the end that the goal of [5] conducting the primary election on June 2, 1992 can be accomplished.

Pursuant to a motion filed by the plaintiffs herein, a status conference was conducted yesterday in open court which was attended by counsel for all of the parties, and at which many of the parties were personally present. In the course of that conference, which lasted for three hours, attorneys for all of the parties, including those for and against the motion filed by the plaintiffs in *Armour v. Ohio* made extensive, detailed arguments. Upon one point all of counsel and indeed, the parties themselves, were in agreement; all agreed that only an immediate

decision by this court, deciding first under which plan the election is to be conducted, and truncating to the greatest reasonable extent the time periods indicated above, could the June 2, 1992 date become a reality. Following recognition of such agreement, at the conclusion of the hearing the presiding judge announced that the case would be considered as submitted and that an opinion deciding the salient issues would be forthcoming within twenty-four hours. It is against that deadline that this opinion is in preparation.

Turning to the major issue facing us for decision, we face the task of, in effect, selecting the least flawed of the proposed redistricting plans, since none is without legal imperfections. One possible alternative, it should be noted, that of simply ordering that no primary election be held for legislative offices until a legally flawless plan is presented, thus automatically permitting incumbents to hold office until [6] that eventuality occurred, we reject out of hand as inappropriate. A reincarnation of the 1991 Plan is not, of course, an option, it having been replaced by the properly published and promulgated 1991 Plan. The 1991 Plan, however, contained several serious errors and omissions as detailed in a thirteen page submission from the defendants. For instance, in Cleveland, War [sic] 4 Precinct CC was completely omitted from the 1991 Plan. Similarly, Coventry Township, Precinct J, in Summit County was omitted. Numerous wards, precincts, and townships were erroneously divided. These deficiencies were corrected in the 1992 Plan. It is now our conclusion that deficiencies of the 1992 Plan are less egregious than those of the 1991 Plan.

In reaching this conclusion, we are in no way depreciating the importance of providing full enlightment to the electorate by the publication and promulgation

process. On the contrary, we regard public education concerning issues and candidates to be a paramount element of the democratic process. In the present instance, however, we conclude that that educational process has been more completely accomplished by the news media than it could have been accomplished through strict compliance with the legal requirements, which could have been met through bare-bones, back-page material which seldom, if ever, is studied by a substantial number of voters. In the present situation, we take judicial notice of the widespread publicity that has been given to this case. The media throughout the state of Ohio has accorded space and time to a discussion of the entire matter, and, indeed, this morning's newspapers, television and radio [7] stories have afforded full coverage, including mention of yesterday's notation that this court would announce a decision today. We therefore hold that substantial compliance with the publication and promulgation requirements have been met.

The fact remains, however, that the Apportionment Board promulgated the 1992 Plan on February 18, 1992, the Secretary of State issued instructions to the county election boards on February 19, 1992, and the filing deadline was February 20, 1992. As previously noted, considerable media interest was focused on this matter. Despite the degree of public attention, we are forced to conclude that the amount of time allowed to decide whether to run in the new districts was inadequate. Accordingly, we direct the Secretary of State to accept new candidate filings in any Ohio House or Senate district reconfigured by the February 18, 1992 amendments. The filing deadline is Friday, May 8, 1992, at 4:00 p.m. The Secretary of State is empowered to take all actions, notwithstanding any statute election law or

time period to the contrary, to assure that any candidates filing under this court-ordered grace period are included in the June 2, 1992 primary election.

IT IS SO ORDERED.

/s/ NATHANIEL R. JONES
Nathaniel R. Jones
U.S. Circuit Judge

/s/ JOHN W. PECK
John W. Peck
Senior U.S. Circuit Judge

DOWD, *J.* dissenting:

I respectfully dissent from that part of the Order which creates a limited period for candidates to file nominating petitions for the Ohio General Assembly.

First, I read the order of the Supreme Court of the United States staying this Court's Orders of March 10, 1992 and March 31, 1992, coupled with the fact that the Supreme Court will review those orders, to divest this district court of jurisdiction with respect to the 1992 Ohio election for the General Assembly. The Court held in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982), as a general rule, that a district court is divested of jurisdiction once a notice of appeal has been filed. *See also Morris v. Morgan Stanley & Co.*, 942 F.2d 648 (9th Cir. 1991); *Masalosalov v. Stonewall Insurance Co.*, 718 F.2d 955 (9th Cir. 1983) and *Thomas v. Board of Education*, 607 F.2d 1043 (2nd Cir. 1979).

The only exception to the general rule that a notice of appeal divests the district court of jurisdiction is found in the situation where the district court is left with the duty of maintaining the status quo during the

pendency of the appeal. *Kiddler, Peabody & Co. Inc. v. Maxrus Energy Corp.*, 925 F.2d 556 (2nd Cir. 1991); and *Hoffman v. Beer Drivers & Salsmen's Local Union No. 888*, 536 F.2d 1268 (9th Cir. 1976).

This is clearly not a case where the district court was vested with the responsibility of maintaining the status quo with regards to elections of members to the Ohio General Assembly. [2] Before this Court was the narrowly defined issue of whether the 1991 Reapportionment Plan was constitutional under the Voting Rights Act and the fifteenth amendment. This Court does not have, nor ever did possess, the jurisdiction to oversee the election process in the state of Ohio. As such the exeption identified in *Kiddler* and other cases is inapplicable. Since the defendant's have filed a notice of appeal with the United States Supreme Court, and the Supreme Court has indicated that it will review this Court's March 10, 1992 and March 31, 1992 decisions, this Court is divested of jurisdiction and cannot address plaintiff's motion to stay.

In the event that my first reason is found to be without merit, I believe this Court should decline jurisdiction over ruling on what are clearly state, not federal, issues. Jurisdiction in this Court was invoked by claims brought under the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution.

Today's Order is in response to claims that the 1992 election for the Ohio General Assembly violates provisions of the Ohio Constitution and enactments of the General Assembly. As such, the plaintiffs seek to amend their complaint to include these pendent state claims. Direction as to the disposition of pendent state claims in federal cases was definitively provided in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). In

Gibbs, the Supreme Court held that pendent jurisdiction may be exercised [3] when there is a substantial federal claim and the state claim arises from a "common nucleus of operative facts." *Id.* at 725.

The *Gibbs* Court noted that district courts are not required to hear state claims that satisfy the two prong test for pendency. The Court explained:

> [I]t has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them . . . Needless decisions of state claims should be avoided as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

Id. at 726.

While the decision to exercise pendent jurisdiction lies within the discretion of the district court, the *Gibbs* Court held that the reasons for exercising pendent jurisdiction are not present in a situation where the federal claims are dismissed. "[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* 726. *See eg. Hardy v. Brimingham Board of Education*, 954 F.2d 1546, 1553 (11th Cir. 1992) ("in the absence of an issues of federal law, and with no federal subject matter jurisdiction other than pendent jurisdiction being present, pendent jurisdiction may not be exercised by a federal court."); *Sem-Torg v. K Mart Corp.*, 936 F.2d 851, 855 (6th Cir. 1991) ("when federal claims are dismissed before trial, the court should dismiss the state claim without [4] prejudice."); and *Baer v. R & F Coal Co.*, 782 F.2d 600 (6th Cir. 1986).

In *Baer*, the plaintiff originally brought suit pursuant to the Age Discrimination in Employment Act. The district court ruled that his federal age claim was time barred, and dismissed the action. After the dismissal of his federal claim, the plaintiff attempted to add a state claim of age discrimination under the doctrine of pendent jurisdiction. The district court denied his request and dismissed the action, holding that because there was no longer a federal claim, there was no claim upon which the state claim could attach. Like the plaintiff in *Baer*, the plaintiffs in the present matter are attempting to interpose a state claim where no federal claim is currently pending.

It is my opinion that the decision of the United States Supreme Court staying this Court's March 10 and March 31, 1992 decisions operates as a dismissal of the federal claims under the Voting Rights Act and the fifteenth amendment for purposes of pendent jurisdiction analysis. In *Evans Transportation Company v. Scullin Steel Co.*, 693 F.2d 715, 718 (7th Cir. 1982), the court held that "apart from the statute of limitations consequences, a stay is the equivalent of a dismissal without prejudice." *See also State Farm Mut. Auto Ins. Co. v. Scholes*, 601 F.2d 1151, 1155 (10th Cir. 1979) (court held that a stay of the present court's proceedings pending the resolution of the state court action would in effect operate as a dismissal without [5] prejudice because a state court judgment would preclude litigation involved in the federal action); and *Centronics Data Computer Corporation v. Merkle-Korff Industries*, 503 F. Supp. 168 (D. New Hamp. 1980).

In the present case, the Supreme Court has stayed the two decisions of this Court that addressed the substantial federal claims under the Voting Rights Act

and the fifteenth amendment. As such, for purposes of pendent jurisdiction, these issues must be treated as voluntarily dismissed. Since the federal claims upon which the plaintiffs wish to attach their state law claims are theoretically absent from this case, this court cannot exercise pendent jurisdiction and allow plaintiffs' state law claims.

Moreover, in the absence of a class certification, I find no standing on the part of any of the named plaintiffs in this action to seek the orders issued by the majority today. Not one of the plaintiffs is directly affected by the failure of the Ohio Apportionment Board to satisfy the publication requirements of O.R.C. 107.09. In their motion for stay, filed April 29, 1992, the plaintiff's attach the affidavit of James Randal Weston, who attests that he changed his residence in compliance with the "1991 Plan", only to be denied the right to run for General Assembly because he had failed to file pursuant to the revised "1992 Plan." While Mr. Weston's predicament is unfortunate, he is not a named plaintiff to this action, and is not the member of [6] any recognized class approved by this Court. Since the plaintiffs are unable to demonstrate that any of the named plaintiffs have been prejudiced, they lack standing to seek today's Order.

The Order from which I dissent is anchored in the concern that potential candidates for the Ohio General Assembly were not given a fair opportunity to declare for the office, either as a candidate for the House of Representatives or as a candidate for the Senate, because the 1991 Plan as revised was not adopted until February 18, 1992 and the deadline for filing was a scant two days later.

While I sympathize with that justifiable concern that prompts the action of my colleagues, I note that no such candidate has sought relief in the state courts. I fear that the cure for the defect as adopted by my colleagues will severely jeopardize the ability of state and county election officials to conduct the 1992 primary in an orderly manner.[1]

/s/ DAVID D. DOWD, JR.
David D. Dowd, Jr.
U.S. District Judge

[1] The affidavit of John F. Bender, Chief Elections Counsel for the Secretary of State, presented to the Court at the states conference hearing conducted on May 4, 1992 and filed with the Clerk's Office on May 5, 1992 demonstrates the difficulties that this Order will create by reopening the process for candidates to declare for the June 2, 1992 primary. A copy of the affidavit is attached as Appendix A.

APPENDIX A

AFFIDAVIT OF JOHN F. BENDER

STATE OF OHIO, }
COUNTY OF FRANKLIN, } ss:

I, John F. Bender, Esquire, having been first duly SWORN and cautioned states that:

1. I am the Chief Elections Counsel for Secretary of State of Ohio Bob Taft. In that capacity I am responsible for supervising Ohio's elections system and having knowledge of matters concerning the operation of that system.

2. If the United States District Court for the Northern District of Ohio issues an order mandating that General Assembly candidates must run from districts established by the Apportionment Plan submitted in October 1991 and not from districts established by the Apportionment Plan as amended on February 18, 1992, a primary election for General Assembly candidates cannot be held on June 2, 1992.

3. There are only 29 days remaining prior to June 2, 1992. There is insufficient time remaining prior to June 2, 1992 to redraw district lines, reprint ballots, determine affected candidates, and reprogram automatic and electronic voting machines for General Assembly candidates to run under the October 1991 districts.

4. Ballots including absentee ballots have been printed and voting machines programmed for all of Ohio's 13,000 plus precincts for districts established by the Apportionment Plan as amended on February 18, 1992. New ballots cannot be printed without General Assembly candidates. Therefore ballot pages will have to be removed in 66 counties utilizing the "punch card" system and names "blocked off" in counties using an

automatic or optical scan system. In addition in those counties using automatic voting systems, machines must be reprogrammed or calibrated and levers covered. Some counties estimate this takes up to 35 days. In Franklin County alone this involved approximately 2800 voting machines in 700+ precincts. There machines are currently being placed or are in place in the precincts.

5. Tens of thousands of ballots must be revised. There will not be time to accomplish those actions specified in paragraph 3 above and voters will vote on non-existent races. Also there exists the probability of programming errors which can affect the validity of other races. Finally in many counties, including Cuyahoga County Ohio's largest, General Assembly races are printed on the same ballot page as other races. Those ballot pages cannot be removed.

6. Absentee ballots must be available no later than May 13 for distribution beginning no later than May 20, 1992. Given this time frame, many of these ballots cannot be "blocked out" for General Assembly candidates. In fact, Portage County will begin distributing absentee ballots on May 5, 1992.

7. Since all candidates have filed and been certified under the districts as provided in the February 18 plan, reverting to the October plan may necessitate establishing new filing and certification deadlines. Either allowing all candidates in affected and non affected districts to refile or allowing only candidates in affected districts to refile will raise legal challenges based on equal protection and due process.

8. The chaos and confusion created among voters who will vote on nonexistent races, candidates who are filed and certified, and elections officials who must now attempt to remove General Assembly races from the

ballot will undermine public confidence in the elections system and potentially affect the validity of the whole primary.

9. Ensuring a second primary on September 8 or some other date creates the chaos and confusion raised in my prior affidavit of April 3, 1992 attached to the Supplemental Memorandum in Support of Application to Stay Order of the District Court filed with the U.S. Supreme Court on April 6, 1992 which is attached hereto and incorporated as if fully rewritten herein.

/s/ JOHN F. BENDER
JOHN F. BENDER

SWORN to before me and subscribed in my presence this 4th day of May, 1992 in Franklin County, Columbus, Ohio.

/s/ _____
Notary Public
My Commission Has No
Expiration Date

No. A-693

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1991

GEORGE V. VOINOVICH, *et al.*,
Appellants,

v.

BARNEY QUILTER, *et al.*,
Appellees.

AFFIDAVIT

State of Ohio :
: SS:
County of Franklin :

Now comes John F. Bender, being first duly cautioned and sworn, says that in his capacity as Chief Elections Counsel to the Ohio Secretary of State, he is responsible for compliance with and enforcement of Ohio elections laws.

Affiant says that in its Order of March 31, 1992, the District Court, in the Case of *Quilter v. Voinovich*, No. 5:91CV2219 (N.D. Ohio, March 31, 1992), stated:

> Having been advised by the office of the Secretary of the State of Ohio that the date of June 2, 1992, for the primary election for the purpose of selecting candidates for membership in the General Assembly of Ohio to be voted upon at the General Election to be held November 3, 1992 as directed by order entered herein March 10, 1992 cannot be met and must be vacated, said primary election is hereby

> rescheduled to be held September 8, 1992. It is further ordered that the Secretary of State of Ohio be and he hereby is enjoined to do all such acts as may be necessary for the holding of such primary election September 8, 1992.

On April 2, 1992, Counsel for Appellees in this case, in their Supplemental Memorandum in Opposition to Appellants' Application for a Stay, stated that "[t]he [2] Secretary of State of Ohio, Robert A. Taft, a Defendant-Appellant herein, has advised the trial court that the State of Ohio could not meet the June 2, 1992, primary date for election to the Ohio General Assembly set by the trial court." Appellees' statement is a mischaracterization of the position of the Ohio Secretary of State. Since the Order of March 10, 1992, enjoining the May 5, 1992, primary date, the Secretary of State has consistently maintained that in order to hold a primary election on June 2, 1992, new legislative districts would have to be in place no later than March 27, 1992. A primary election could, therefore, take place on June 2, 1992, under the legislative districts established under the 1991 plan of apportionment, which plan was enjoined by the District Court on March 10, 1992.

Affiant further states that the Ohio General Assembly, in House Bill 700, signed by the Governor, in an effort to avoid the necessity of holding two primary elections in 1992, moving the entire Ohio primary election to June 2, 1992, the date originally set as the date for the primary election by the District Court in this case.

Affiant says that the District Court's Order of March 31, 1992, fixing September 8, 1992, as the date of the primary election for members of the Ohio General

Assembly, unless stayed by this Court, will necessitate the holding of two primary elections in Ohio in 1992, at an additional cost of approximately $6,000,000.00.

Affiant states that local boards of elections will be in the middle of preparing for the November 3rd general election on September 8. To prepare for a special primary while preparing for the August special and November general elections will present many local boards with massive administrative and financial problems. Counties which are responsible for paying for elections have indicated they cannot afford an additional election due to budgetary constraints.

Affiant says that a September 8, 1992, primary election means Ohio will have three statewide and two special elections in 1992, rendering the recruitment of sufficient qualified pollworkers for five elections in one year impossible in some areas.

Affiant further states that under Ohio law, voting machines must be locked for 60 days after an election, to preserve evidence of the official votes cast. If a primary is held on September 8, 1992, the machines cannot be unlocked in time for the November 3, 1992, general election. Likewise, voting machines used for the August special election cannot be used on September 8, 1992. The State of Ohio will, therefore, have an insufficient number of voting machines available to conduct an election on September 8, 1992, which complies with Ohio law.

Affiant says that by the establishment of a September 8, 1992, primary election date, many out-of-state and military Ohio citizens may not be aware of the new primary [3] or of the need to request absentee ballots for that date. Affiant further says that by law, absentee ballots must be available 35 days prior to the

November 3, 1992, general election. A September 8, 1992, primary will allow only six days to print absentee ballots, an impractical deadline to meet. Absentee ballots for the September 8, 1992, primary would have to be made available on the same day as the absentee ballots provided for the August 4, 1992 special election, which will create great confusion among the absentee voters.

Further, Affiant says that candidates for election to the Ohio General Assembly have already filed under existing districts. To hold a September primary with new districts may force candidates to move more than once to meet the Ohio constitutional and statutory residency requirement.

Further Affiant says not.

JOHN F. BENDER
John F. Bender

Sworn to and subscribed in my presence this 3rd day of April, 1992.

/s/ _____
Notary Public
My Commission Has No
Expiration Date

IN MANDAMUS ENTRY OF THE SUPREME COURT OF OHIO

(Filed May 28, 1992)

Case No. 92-972

THE SUPREME COURT OF OHIO

STATE OF OHIO, *ex rel.* DARLENE ROGERS,
Relator,

v.

ROBERT A. TAFT, *et al.*,
Respondents.

IN MANDAMUS

ENTRY
(Corrected)

This cause originated in this Court on the filing of a complaint for a writ of mandamus regarding an expedited election matter. Upon consideration of relator's request for a peremptory writ in the first instance,

IT IS ORDERED by the Court that said request for a peremptory writ in the first instance be, and the same is hereby, denied.

/s/ THOMAS J. MOYER
Chief Justice

IN MANDAMUS ENTRY OF THE SUPREME COURT OF OHIO

(Filed June 2, 1992)

Case No. 92-972

THE SUPREME COURT OF OHIO

STATE OF OHIO, *ex rel.* DARLENE ROGERS,
Relator,

v.

ROBERT A. TAFT, *et al.*,
Respondents.

IN MANDAMUS

ENTRY

This cause originated in this Court on the filing of a complaint for a writ of mandamus regarding an expedited election matter and was considered in a manner prescribed by law. Upon consideration of relator's motion for summary judgment,

IT IS ORDERED by the Court that said motion for summary judgment be, and the same is hereby, overruled.

IT IS FURTHER ORDERED by the Court that the writ of mandamus be, and the same is hereby, denied, consistent with the opinion to follow.

/s/ THOMAS J. MOYER
Chief Justice

92-685

Supreme Court, U.S.
FILED
NOV 5 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF OHIO, on relation of Darlene Rogers,
Petitioner,

vs.

ROBERT A. TAFT, Ohio Secretary of State, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio
Brief in Opposition for Respondent

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BEST AVAILABLE COPY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

QUESTION PRESENTED FOR REVIEW

Whether this Court has jurisdiction to grant a writ of certiorari where: (1) the decision below rests upon an adequate and independent state ground; (2) the facts below will not support a determination by this Court of the question presented by the Petitioner; and (3) the petition has not been timely filed.

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STATEMENT OF THE CASE

Prior to February 20, 1992, Petitioner was furnished with declaration of candidacy forms by the Mahoning County Board of Elections. At that time, Petitioner was informed that the filing deadline for declarations of candidacy for nomination as a candidate of the Democratic Party for election to the office of State Representative from the 64th House District was February 20, 1992.

On May 8, 1992, Petitioner attempted to file with the Board of Elections a declaration of candidacy for election to the office of State Representative from the 64th House District. See Appendix to Petition for Certiorari, hereinafter referred to as "A.", at A.1. Because the deadline for the filing of declarations of candidacy for the 64th House District was February 20, 1992, the Board of Elections did not accept the petitions for filing. Instead, the petitions were accepted

only for the purpose of establishing that Petitioner had attempted to file them on May 8, 1992. See A.1.

Upon the receipt of the petitions for the limited purpose noted above, the Board of Elections checked the signatures on the petitions for sufficiency as required by Ohio law. Of the sixty signatures found on the petitions, the Board of Elections determined that, under Ohio law, only forty-six of the signatures were valid. Because the petitions had been untimely filed and because the petitions contained only forty-six valid signatures, when Ohio law required fifty valid signatures, the petitions were disallowed by the Board of Elections. See A.2.

On May 18, 1992, Petitioner filed an original action in mandamus in the Supreme Court of Ohio. The action set forth three claims. The first alleged that the Defendants had a clear duty to accept the declaration of candidacy because the filing deadline for the 64th House District had been implicitly extended

by the U.S. District Court for the Northern District of Ohio in the case of Quilter v. Voinovich, U.S. District Court Case No. 91 CV 2219 (May 5, 1992). See A.2.

Petitioner's second claim for relief alleged that the Board of Elections had improperly invalidated fourteen of the signatures on the petitions in violation of provisions of Ohio law. See A.2.

Finally, in Petitioner's third claim for relief, she alleged that she was a member of the class in Armour v. Ohio, 775 F. Supp. 1044 (N.D. Ohio 1991) and that the Supreme Court of Ohio should order that majority-minority districts be created for all at large elections for multi-member offices in Mahoning County. See A.2.

On June 2, 1992, the Ohio Supreme Court entered an order denying the request for a writ of mandamus, "consistent with the opinion to follow." See A.54. The opinion was announced June 19, 1992. See A.1.

WHY WRIT SHOULD BE DENIED

POINT I

THIS COURT HAS NO JURISDICTION TO GRANT A WRIT OF CERTIORARI WHERE THE DECISION BELOW RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Where a state court decision indicates clearly that it is based on bona fide separate, adequate and independent grounds, the United States Supreme Court will not undertake to review the decision. Michigan v. Long, 463 U.S. 1032, 1041 (1983). This Court has held that its only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. Ridgway v. Ridgway, 454 U.S. 46, 54 (1981). Where a state court rests its decision on both state and federal grounds, either of which are dispositive of the matter, this Court has held that it has no jurisdiction. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977) (citing Fox Film Corp. v. Muller, 296 U.S. 207 (1935)).

In the instant case, the decision of the Ohio Supreme Court rests upon an adequate and independent state ground: to wit, that Petitioner had failed to obtain the requisite number of signatures required under Ohio law for declarations of candidacy. In addition, even if the Ohio Supreme Court had determined that, as a matter of federal law, the filing deadline for the 64th House District should have been extended, the court would have nonetheless denied the request for a writ of mandamus since the requisite number of signatures had not been obtained by Petitioner.

It is submitted that the decision below rests upon an adequate and independent state ground and, therefore, that this Court has no jurisdiction grant a writ of certiorari in this case.

POINT II

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI WHERE THE FACTS BELOW WILL NOT SUPPORT A DETERMINATION BY THIS COURT OF THE QUESTION PRESENTED BY PETITIONER.

This Court should not grant a writ of certiorari where the facts below will not support a determination by this Court of the question presented by Petitioner.

As set forth in the statement of the case, Petitioner's complaint had alleged three claims for relief, two of which were personal to her. Her third claim for relief presented the issue which Petitioner is now presenting to this Court for review. However, the record below is devoid of any evidence sufficient to support a determination by this Court of the issue presented.

A reading of the Ohio Supreme Court's opinion indicates that only one paragraph was devoted to this final claim for relief. See A.6. In that paragraph, the Ohio Supreme Court found that nothing under the Ohio Revised Code required the county Board of Elections to act as

an apportionment agent. Id. The court further found that Petitioner had adduced no evidence that the state had violated the Fifteenth Amendment to the U.S. Constitution or the Voting Rights Act of 1965. Id.

Respondent points out that Petitioner had the opportunity to litigate this issue before the Ohio Supreme Court and could have presented evidence in support of the claim. Yet, the issue was not litigated and Respondent did not have the opportunity to present evidence on the matter. The matter is thus not ripe for review at this time.

Finally, it should be noted that Respondent has always taken the position that the issue which Petitioner now presents for review was never properly before the Ohio Supreme Court. Petitioner had an adequate remedy at law by way of a declaratory judgment action on the matter. In fact, the issue was presented to the U.S. District Court for the Northern District of Ohio in the case of Armour v. Ohio, Case No. C88-1104Y. Rather than prosecute an appeal from

the decision of the district court in that case, Petitioner chose to dismiss the appeal and present the matter directly to the Ohio Supreme Court in connection with her action in mandamus.

It is submitted that Petitioner failed to adequately and properly present this issue in the lower courts. As such, this Court should not now grant a writ of certiorari to review it.

POINT III

THE PETITION WAS NOT TIMELY FILED.

As set forth in the statement of the case, the Ohio Supreme Court issued an order on June 2, 1992, denying Petitioner's request for a writ of mandamus, consistent with "the opinion to follow." The opinion was announced on June 19, 1992.

Under 28 U.S.C. Section 2101(c), a petition for writ of certiorari in a civil case must be filed within ninety days of the judgment upon which the decision rests. It has been held by this Court that this requirement is mandatory and jurisdictional. Missouri v. Jenkins, 495 U.S. 33, 45 (1990). The critical act constituting the entry of the judgment in the lower courts is the notation of the judgment in the docket by the court clerk. That is the date to be used in calculating the time for petitioning for certiorari. See Scofield v. Labor Board, 394 U.S. 423, 427 (1969); United States v. Hark, 320 U.S. 531, 534 (1944). A judgment is final for purposes of review by this

Court when the record reveals that it leaves nothing to be done by the lower court, that the court has fully adjudicated rights and that that adjudication is not subject to further review. Dept. of Banking, State of Nebraska v. Pink, 317 U.S. 264 (1942).

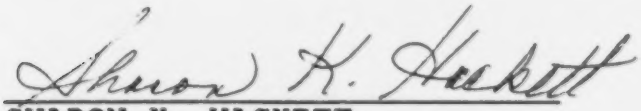
It is submitted that all rights of Petitioner were fully adjudicated on June 2, 1992 when the Ohio Supreme Court entered its order denying Petitioner's request for a writ of mandamus.

Thus, as the petition in this case was filed more than ninety days from the entry of the judgment in this case on June 2, 1992, it was untimely filed and this Court must dismiss the petition.

CONCLUSION

This Court should deny the petition for a writ of certiorari and the judgment below should stand.

Respectfully submitted,



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Supreme Court, U.S.
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CASE NO. 92-685

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF OHIO, ON RELATION OF DARLENE ROGERS,
Petitioner,

vs.

ROBERT A. TAFT, OHIO SECRETARY OF STATE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT SECRETARY OF STATE'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Is a decision of a state court of last resort denying a writ of mandamus on state law grounds reviewable by this Court?

2. Do the doctrines of *res judicata* and collateral estoppel prevent relitigation in a state court of issues that were previously raised by the same party in a federal court action?

3. Does an alleged conflict between two decisions of a state court of last resort or between a decision of a state court of last resort and a position asserted by a party in a brief in another case create a conflict reviewable by this Court?

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STATEMENT OF THE CASE

Petitioner Darlene Rogers[1] seeks review of a decision of the Ohio Supreme Court refusing to issue a writ of mandamus against the Respondents Bob Taft, Secretary of State of Ohio and the Mahoning County Board of Elections. Petitioner sought a writ ordering that all county commissioners and common pleas court judges in Mahoning County be elected from single member districts rather than at large.[2]

Petitioner's statement of the case discusses the facts in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) and *George V. Voinovich, Governor of the State of Ohio, et al. v. Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, et al.*, United States Supreme Court Case No. 91-1618, but only briefly mentions the case in which certiorari is actually being sought. Petitioner's discussion of *Armour*, which challenged under the Voting Rights Act the 1981 reapportionment of the General Assembly districts in Mahoning County, Ohio, merely emphasises the fact that the issue on which Petitioner seeks review was first asserted in *Armour*, and should properly be pursued in that action. Contrary to Petitioner's assertion, this case is not related

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[1] Petitioner Darlene Rogers was the sole Plaintiff in the court below. Petitioner now asserts that she "appeals here solely in her capacity as a member of the *Armour* class and on behalf of the *Armour* class." Petition for a Writ of Certiorari at 4. However, this case was not brought as a class action nor was class certification ever sought or obtained in this case. Class certification is not simply transferable from one case to another, and the rights of a class cannot be asserted when a class has not been certified. Petitioner has filed a motion seeking to substitute Isadore Blakeny as the Petitioner in this matter. Respondents have opposed this motion because such a substitution is not authorized by Rule 35 of the Supreme Court, and if Petitioner no longer wishes to pursue the matter, the proper procedure is to dismiss the action, not substitute parties.

[2] Petitioner also sought a writ ordering that she be placed on the June 2, 1992 Democratic primary election ballot as a candidate for nomination in the 64th Ohio General Assembly House district, however, she is not contesting the Ohio Supreme Court's rejection of this claim.

to *Voinovich v. Quilter*, which addresses the 1991 statewide reapportionment of Ohio's General Assembly by the Apportionment Board. Local elections for county commissioners and judges are not under the jurisdiction of the Apportionment Board and are not at issue in the *Voinovich v. Quilter* case.

The Ohio Supreme Court, in a *per curiam* decision, held that under state law, Petitioner had no legal right to the relief sought, Respondents had no clear legal duty to perform the requested acts, and Petitioner had an adequate remedy at law to pursue in the *Armour* court. *State ex rel. Rogers v. Taft*, 64 Ohio St.3d 193, 198, 594 N.E.2d 576 (1992).

REASONS FOR DENYING THE WRIT

Whether to grant review on a writ of certiorari is solely within the discretion of this Court. Sup. Ct. R. 10. Before a writ of certiorari will issue, Petitioner must demonstrate to the satisfaction of this Court that her case presents "special and important reasons" deserving attention. *Id.* These reasons "imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). They must involve "principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals," *Layne & Bowler Corp. v. Western Wells Works, Inc.*, 261 U.S. 387, 393 (1923) *quoted in Rice*, 349 U.S. at 619-20, or between state courts of last resort. Sup. Ct. R. 10.

Although Petitioner does not identify which of the above criteria are met by this case, a review of the Petition for a Writ of Certiori and the opinion below demonstrates that this case does not warrant this Court's review.

I. THE DECISION OF THE OHIO SUPREME COURT SHOULD NOT BE REVIEWED BECAUSE IT RESTS UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

Petitioner is seeking review of the decision of the Ohio Supreme Court refusing to issue a requested writ of mandamus ordering Respondent Secretary of State to construct single member majority-minority districts (districts in which a majority of the voters are African-Americans) for judicial and county commissioner elections in Mahoning County Ohio. The Ohio Supreme Court succinctly rejected this claim as follows:

> Similarly, we find no merit in relator's third claim for relief. She claims that respondent Taft's adoption of the position that majority-minority districts must be created wherever possible estops him from denying it in this case, and that R.C. 3501.05(C) and (M) then compel him to instruct the respondent-board to construct, prior to the primary election, such districts in Mahoning County for elections that would otherwise be at large. R.C. 3501.05(C) requires the Secretary of State to "[p]repare rules and instructions for the conduct of elections"; R.C. 3501.05(M) requires him to "[c]ompel the observance by election officers in the several counties of the requirements of the election laws[.]" We find nothing in these statutes requiring the board to act as an apportionment agent, whatever the Secretary of State's views may be, or may have been, on majority-minority districts. Nor has relator adduced any evidence that the state has violated the Fifteenth Amendment to the United States Constitution or the Voting Rights Act of 1965 by providing for election of judges, county commissioners, and others at large instead of from separate districts.

State ex rel. Rogers v. Taft, 64 Ohio St.3d at 195-96.

The Ohio Supreme Court clearly decided this case on independent and adequate state law grounds, holding that the Ohio statutes relied upon by Petitioner did not create a clear legal duty in the Respondents to reapportion at large elections for judges and county commissioners in Mahoning

County to single member districts. As the Ohio Supreme Court concluded:

> "In order to grant a writ of mandamus, a court must find that the relator has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law." *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42, 399 N.E.2d 81, paragraph one of the syllabus. Relator having failed to establish all three of these elements in any of her claims for relief, we hereby deny the writ.

State ex rel. Rogers v. Taft, 64 Ohio St.3d at 198.

This Court has consistently refused to review state court judgments that rest upon independent and adequate state grounds. "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). This rule prevents decisions of this Court from being merely advisory, without power to affect the state court judgment. Any decision in this case would be merely advisory, for the Ohio Supreme Court has clearly held that the state laws relied upon by the Petitioner create no right to the writ of mandamus sought.

This Court has held that even if a state court's decision rests on alternative state and federal grounds, a writ of certiorari will not issue. "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1041 (1982). Here, the Ohio Supreme Court expressly held that the Ohio statutes relied upon by the Petitioner did not create a clear legal duty for the Respondents to reapportion local Mahoning county elections. On its face, the Ohio Supreme Court's decision does not "rest primarily on federal law" *Michigan v. Long*,

463 U.S. at 1040, and is not "interwoven with federal law." *Id.*

It is certainly "an Olympic stretch", *Sochor v. Florida*, ___ U.S. ___ , 112 S.Ct 2114 (1992), to say that the Ohio Supreme Court's single sentence: "Nor has relator adduced any evidence that the state has violated [federal law]. . .", *State ex rel. Rogers v. Taft*, 64 Ohio St. 3d at 196, is sufficient to vest this Court with jurisdiction. As the decision of the Ohio Supreme Court rests upon independent and adequate state law grounds, a writ of certiori should not issue.

II. A WRIT OF CERTIORARI SHOULD NOT ISSUE BECAUSE THE CLAIM ON WHICH PETITIONER SEEKS REVIEW IS BARRED BY THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL.

Petitioner asserts that she "is a member of plaintiff's class in *Armour*. Petitioner appeals here solely in her capacity as a member of the *Armour* class and on behalf of the *Armour* class." Petition for a Writ of Certiorari at 4. Petitioner is seeking review of an order of the Ohio Supreme Court denying her request for an order requiring Respondent Bob Taft, Secretary of State of Ohio, to change judicial and county commissioner elections in Mahoning County from at large to single member districts. The *Armour* Plaintiff class on April 21, 1992, sought this same relief from the *Armour* court. *State ex rel. Rogers v. Taft*, 64 Ohio St. 3d at 194. When the *Armour* court denied the requested relief on April 23, 1992, the *Armour* Plaintiffs filed a Notice of Appeal to this Court on April 30, 1992. On May 22, 1992, the *Armour* Plaintiffs moved to dismiss their appeal.

The doctrine of *res judicata* bars a litigant from "relitigating issues that were or could have been raised" in an earlier case. *Federated Department Stores v. Moitie*, 452 U.S. 394, 398 (1981). *Res judicata* encompasses both issue preclusion, which is frequently termed collateral estoppel, and claim preclusion. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984). The issue on which Petitioner

is seeking a writ of certiorari from this Court has already been litigated and decided by the *Armour* court and thus the doctrines of collateral estoppel and *res judicata* bar Petitioner's attempts to relitigate the issue.

Petitioner should not be permitted to bypass the *Armour* court by asserting in another forum, "on behalf of the *Armour* class," a claim already asserted in the *Armour* court. If the *Armour* class seeks to impose majority-minority single member districts on elections that are presently at large in Mahoning County, they must pursue that claim in the *Armour* court and through the process of appeals from that court. Therefore, a writ of certiorari should not issue.

III. THE DECISION OF THE OHIO SUPREME COURT DOES NOT CONFLICT WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT, A FEDERAL COURT OF APPEALS, OR THIS COURT.

Petitioner asserts that the Ohio Supreme Court's statement in this case that evidence is required to establish a claim under the Voting Rights Act conflicts with the same court's interpretation in *Voinovich v. Ferguson*, 63 Ohio St.3d 198, 586 N.E.2d 1020 (1992) that Ohio's 1991 General Assembly reapportionment plan is constitutional. Petition for a Writ of Certiorari at 11. A review of the Ohio Supreme Court's one page *per curiam* decision in *Voinovich v. Ferguson* reveals, however, that the only question decided in that case was whether the plan adopted by the Apportionment Board in redistricting the Ohio General Assembly met the population requirements of Ohio Const. Art. XI §§ 4, 9, and 11. The Voting Rights Act was not discussed in the opinion. It is apparent from a comparison of the decision below and the Ohio Supreme Court's decision in *Voinovich v. Ferguson* that there is no conflict between the two decisions.

Even assuming *arguendo*, that there is a conflict between the case below and *Voinovich v. Ferguson*, it is a conflict between two decisions of the Ohio Supreme Court. A conflict between its own decisions should be resolved by the Ohio

Supreme Court itself, not by this Court. Under Rule 10 of the United States Supreme Court Rules of Procedure, this Court will grant a writ of certiorari to resolve a conflict between a decision of a state court of last resort and a decision of another state court of last resort, a federal court of appeals, or this Court. This rule recognizes that conflicts between different opinions of the same court are a matter for that court to resolve, and are not of sufficient importance to warrant the issuance of a writ of certiorari.

The statement of the Ohio Supreme Court which Petitioner states "gave rise to this Petition," Petition for a Writ of Certiorari at 7, is: "[n]or has Relator adduced any evidence that the state has violated the Voting Rights Act . . . . *State ex rel Rogers v. Taft*, 64 Ohio St.3d at 196. Petitioner concedes, however, that requiring a person alleging a violation of the Voting Rights Act to present evidence to prove a violation before relief can be granted is a correct statement of law and is in compliance with, and does not conflict with, the decision of this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and the decision of the three judge district court in *Voinovich v. Quilter, supra*. Petition for a Writ of Certiorari at 8-11. As the Ohio Supreme Court's decision is admittedly in agreement with, rather than in conflict with, the relevant decisions, a writ of certiori should not issue.

The only other "conflict" the Petitioner points out is an alleged conflict between the court's decision below and a statement in the Pretrial Brief of the Defendants in *Voinovich v. Quilter, supra*. Petition for a Writ of Certiorari at 5. A conflict between a state supreme court decision and the position advocated by a party in a brief in another case certainly is not a legal conflict which should be addressed by this Court.

IV. THE OHIO SUPREME COURT HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Petitioner argues that this case merits certiorari because

it presents the issue of whether, under the Voting Rights Act, evidence of discrimination is required before creating majority-minority districts. Petition for a Writ of Certiorari at 11.

Petitioner concedes, however, that this issue is already being addressed by this Court in *Voinovich v. Quilter, supra,* a case in which this Court has already issued a writ of certiorari and which is scheduled for oral argument on December 8, 1992. Petition for a Writ of Certiorari at 4. Petitioner asserts that this case is "directly related to *George V. Voinovich, Governor of the State of Ohio, et al. v. Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, et al.,* Case No. 91-1618 and should, if certiorari is granted, be consolidated with *Voinovich* for oral argument during the Court's October term." Petition for a Writ of Certiorari at 4.

There is no reason to grant certiorari in this case so that it can be consolidated with *Voinovich v. Quilter.* There are no facts presented by this case which would shed light on the issues presented in *Voinovich v. Quilter,* for this case was decided by the Ohio Supreme Court as a matter of law before an agreed statement of facts was even filed with the court. In addition, there are no legal issues presented by this case which warrant consolidation of this matter with *Voinovich v. Quilter.*

As this Court is aware, the *Voinovich v. Quilter* case concerns Ohio's decennial redistricting of its General Assembly. Petitioner here is seeking review of a decision denying, on state law grounds, her request for an order requiring common pleas judges and county commissioners in Mahoning County, Ohio to be elected from single member districts rather than at large. Petition for a Writ of Certiorari at 6, footnote 2. The only way these cases are interrelated is that Petitioner is attempting to create a right to majority-minority districts in judicial and county commissioner races in Mahoning County on the basis of language in a Pretrial Brief of the Defendants filed in the three-judge court in *Voinovich v. Quilter.* This tenuous relationship does not

support consolidation. Thus, a writ of certiorari should not issue.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Ohio Constitution Article XI §4

§4 [Population of each senate district.]

The population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in section 2 of this Article, and in no event shall any senate district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the senate as determined pursuant to this Article.

Ohio Constitution Article XI §9

§9 [When population of county is fraction of ratio of representation.]

In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the house of representatives, reasonable effort shall be made to create a house of representatives district consisting of the whole county.

Ohio Constitution Article XI §11

§11 [Senate districts.]

Senate districts shall be composed of three contiguous house of representatives districts. A county having a least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county

by the ratio of representation in the senate determined under section 2 of this Article.

Senate districts shall be numbered from one through thirty-three and as provided in section 12 of this Article.

OHIO REVISED CODE §3501.05

3501.05 Duties and powers of secretary of state

The secretary of state shall:

(A) Appoint all members of boards of elections;

(B) Advise members of such boards as to the proper methods of conducting elections;

(C) Prepare rules and instructions for the conduct of elections;

(D) Publish and furnish to the boards from time to time a sufficient number of indexed copies of all election laws then in force;

(E) Edit and issue all pamphlets concerning proposed laws or amendments required by law to be submitted to the voters;

(F) Recommend to boards the form of registration cards, blanks, and records;

(G) Determine and prescribe the forms of ballots and the forms of all blanks, cards of instructions, pollbooks, tally sheets, certificates of election, and all forms and blanks required by law for use by candidates, committees, and boards;

(H) Prepare the ballot title or statement to be placed on the ballot for any proposed law or amendment to the constitution to be submitted to the voters of the state;

(I) Certify to the several boards the forms of ballots and

names of candidates for state offices, and the form and wording of state referendum questions and issues, as they shall appear on the ballot;

(J) Approve ballot language for any local question or issue;

(K) Receive all initiative and referendum petitions on state questions and issues and determine and certify to the sufficiency of such petitions;

(L) Require such reports from the several boards as are provided by law, or as he deems necessary;

(M) Compel the observance by election officers in the several counties of the requirements of the election laws;

(N) Investigate the administration of election laws, frauds, and irregularities in elections in any county, and report violations of election laws to the attorney general or prosecuting attorney, or both, for prosecution;

(O) Make an annual report to the governor containing the results of elections, cost of elections in the various counties, a tabulation of the votes in the several political subdivisions, and such other information and recommendations relative to elections as he deems desirable;

(P) Prescribe and distribute to boards of elections a list of instructions indicating all legal steps necessary to petition successfully for local option elections under sections 4301.32 to 4301.41, 4303.29, 4305.14, and 4305.15 of the Revised Code;

(Q) Perform such other duties as are required by law.

In the performance of his duties as the chief election officer, the secretary of state may administer oaths, issue subpoenas, summon witnesses, compel the production of books, papers, records, and other evidence and fix the time and place for hearing any matters relating to the administration and enforcement of the election laws.

In any controversy involving or arising out of the adoption of registration or the appropriation of funds therefor the secretary of state may, through the attorney general, bring an action in the name of the state in the common pleas court of the county where the cause of action arose or in an adjoining county thereto, to adjudicate the question.

In any action involving the laws in Title XXXV of the Revised Code wherein the interpretation of those laws is in issue in such a manner that the result of the action will affect the lawful duties of the secretary of state or of any board of elections, the secretary of state may, on his motion, be made a party.

The secretary of state may apply to any court that is hearing a case in which he is a party, for a change of venue as a substantive right and such change of venue shall be allowed, and the case removed to the common pleas court of an adjoining county named in the application, or, where there are cases pending in more than one jurisdiction that involve the same or similar issues, Franklin county.